TRIAL

Court File No: 619/90

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

B E T W E E N :

**GLAD DAY BOOKSHOP INC. and
JEARLD MOLDENHAUER**

Appellants

- and -

**DEPUTY MINISTER OF NATIONAL REVENUE FOR
CUSTOMS AND EXCISE**

Respondent

RESPONDENT'S BOOK OF AUTHORITIES

VOLUME II

Paul J. Evraire, Q.C.
Department of Justice
Exchange Tower
2 First Canadian Place
Box 36, Suite 3400
Toronto, Ontario M5X 1K6

Per: Debra M. McAllister
Rhea M.J. Hoare

Tel: [redacted]
File: TO. 174583

Solicitors for the Respondent

Court File No: 619/90

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

B E T W E E N:

GLAD DAY BOOKSHOP INC. and JEARLD MOLDENHAUER

Appellants

- and -

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

Respondent

RESPONDENT'S BOOK OF AUTHORITIES

Paul J. Evraire, Q.C.
Department of Justice
Exchange Tower
2 First Canadian Place
Box 36, Suite 3400
Toronto, Ontario M5X 1K6

Per: Debra M. McAllister
Rhea M.J. Hoare

Tel: (416) 973-3158
File: TO. 174583

Solicitors for the Respondent

Court File No: 619/90

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

B E T W E E N :

GLAD DAY BOOKSHOP INC. and JEARLD MOLDENHAUER

Appellants

- and -

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

Respondent

RESPONDENT'S BOOK OF AUTHORITIES

I N D E X

VOLUME I

TAB NO.

1. Glad Day Bookshop Inc. v. Deputy Minister of National Revenue for Customs and Excise, unreported, released April 8, 1992 (O.C.G.D.)

2. Butler v. The Queen, unreported, released February 27, 1992 (S.C.C.), at pp. 31-32

3. R. v. Doug Rankine Co. (1983), 36 C.R. (3d) 154 (Ont. Co. Ct.)

4. R. v. Ramsingh (1984), 14 C.C.C. (3d) 230 (Man. Q.B.) at pp. 239-240

TAB NO.

5. R. v. Wagner (1985), 43 C.R. (3d) 318 (Alta. Q.B.) at p. 331; appeal dismissed (1986), 50 C.R. (3d) 175 (Alta. C.A.)

6. R. v. Red Hot Video (1985), 45 C.R. (3d) 36 (B.C.C.A.) at pp. 43-44

7. Towne Cinema Theatres Ltd. v. R. (1985), 45 C.R. (3d) 1 (S.C.C.) at p. 14

VOLUME II

TAB NO.

8. Luscher v. Deputy Minister, Revenue Canada, Customs and Excise (1985), 45 C.R. (3d) 81 (F.C.A.)

9. R. v. Simmons (1988), 55 D.L.R. (4th) 673 (S.C.C.)

10. Re Winkler and Deputy Minister of National Revenue for Customs and Excise (1973), 15 C.C.C. (2d) 168 (Ont. Co. Ct.) at p. 174

11. R. v. Morin, unreported, released March 26, 1992 (S.C.C.)

12. Akthar v. Minister of Employment and Immigration, [1991] 3 F.C. 32 (C.A.)

13. Roth v. United States (1957), 354 U.S. 476

14. Freedman v. Maryland (1965), 380 U.S. 51

15. United States v. Thirty-Seven Photographs (1971), 402 U.S. 363

VOLUME III

TAB NO.

16. K.C. Davis, Administrative Law Treatise, 2d ed., Vol. 4 (San Diego, California: K.C. Davis, 1983) at p. 434

17. "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes" (1977), Harv. L. Rev. 1682

TAB NO.

18. P.W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) at pp. 150-151

19. Douglas/Kwantlen Faculty Association v. Douglas College [1990] 3 S.C.R. 570

20. Egan and Nesbit v. The Queen (1991), 47 F.T.R. 305

21. R. v. L. (W.K.) (1991), 64 C.C.C. (3d) 321 (S.C.C.)

22. MacKay v. Manitoba (1989), 61 D.L.R. (4th) 385 (S.C.C.)

23. R. v. Fringe Products Inc. (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.)

24. The Queen v. Nop Ltd., unreported, released September 6, 1991 (O.C.G.D.)

25. The Queen v. Mawson, unreported, released January 31, 1992 (O.C.P.D.)

LUSCHER v. DEPUTY MINISTER, REVENUE CANADA, CUSTOMS AND EXCISE

Federal Court of Appeal, Thurlow C.J.F.C., Mahoney and Hugessen JJ.

Heard — March 6 and 7, 1985.
Judgment — March 14, 1985.

Defences — Charter of Rights and Freedoms (Constitution Act, 1982) — Guarantee of rights and freedoms — Reasonable limit prescribed by law under s. 1 having to be expressed in sufficiently clear terms — Customs tariff prohibition of importation of immoral or indecent matter being too vague to be reasonable limit.

The applicant sought to import for personal use a book depicting various sexual activities. The importation was prohibited by the Deputy Minister of Revenue Canada Customs and Excise as immoral or indecent under a tariff item read in conjunction with s. 14 of the Customs Tariff. Having appealed unsuccessfully to a County Court Judge, the applicant appealed to the Federal Court of Appeal.

Held — Appeal allowed; decision of deputy minister vacated.

A reasonable limit prescribed by law under s. 1 of the Canadian Charter of Rights and Freedoms must be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is by that fact alone an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is in fact lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally-protected rights and freedoms. A limitation of a guaranteed right must allow a very high degree of predictability of the legal consequences.

A Customs Tariff prohibition of the importation of matter that is immoral or indecent is not a reasonable limitation upon the freedoms guaranteed by s. 2(*b*) of the Charter and is of no force or effect. In contrast with the obscenity provisions of the Criminal Code contained in s. 159(8), the words "immoral" and "indecent" were not defined in the legislation and were furthermore highly subjective and emotional in their content. The community standards of tolerance test may have reduced the inherent subjectivity of the words "immoral" and "indecent", but, if anything, had had the effect of increasing their uncertainty.

Annotation

Before the advent of the Charter, void for uncertainty was a well-recognized ground of challenge to by-law offences (see, for example, *Harrison v. Toronto* (1982), 39 O.R. (2d) 721, 31 C.R. (3d) 244, 19 M.P.L.R. 310, 140 D.L.R. (3d) 309 (H.C.)), but our courts had recoiled from its availability in the case of other types of criminal sanction. In *R. v. Pink Triangle Press* (1979), 45 C.C.C. (2d) 385 (Ont. Prov. Ct.), Harris Prov. J. held that the undefined term "immoral" in s. 164 of the Criminal Code was so "ambiguous and indefinite" (p. 407) that it had "no legally enforceable meaning" (p. 408). This decision was, however, soon reversed (51 C.C.C. (2d) 485 (Co. Ct.)) and on further appeal the Ontario Court of Appeal (19 C.R. (3d) 393 (sub nom. *Popert v. R.*), 58 C.C.C. (2d) 505) confirmed that the

trial judge had erred. On behalf of the court Zuber J.A. agreed that the meaning of "immoral" *was* imprecise but, observing that the courts often had to interpret imprecise terms such as "reasonable", "undue" and "dangerous", held at p. 398 that the courts had "to work as best they can with the tools in hand".

Now various Courts of Appeal have held that a Charter right or freedom cannot be subject to a reasonable limit prescribed by law under s. 1 if that law is too vague. In adopting in this context the complex United States doctrine of "void for vagueness", our courts have now opened a "Pandora's box of constitutional concepts": see Mansell's annotation to *Ont. Film & Video Appreciation Soc. v. Ont. Bd. of Censors* (1983), 34 C.R. (3d) 74, at p. 74. The ruling of the Divisional Court of the Ontario Supreme Court in *Ont. Film & Video Appreciation Soc. v. Ont. Bd. of Censors* (1983), 41 O.R. (2d) 583, 34 C.R. (3d) 73 at 83, 147 D.L.R. (3d) 58, 5 C.R.R. 373, was obiter — as it was held that a non-binding set of guidelines promulgated by pamphlet were not capable of being law, a decision that was confirmed by the Ontario Court of Appeal, 45 O.R. (2d) 80, 38 C.R. (3d) 271, 5 D.L.R. (4th) 766, 7 C.R.R. 129, 2 O.A.C. 388. Now, however, there is express authority for the void for vagueness approach to the concept of reasonable limits in the decisions of the British Columbia Court of Appeal in *R. v. Red Hot Video Ltd.*, ante, p. 36, and *R. v. Robson*, ante, p. 68, also 31 M.V.R. 220, and by the Federal Court of Appeal in *Luscher*. The rulings that our existing obscenity laws are not too vague — express in *Red Hot Video* and obiter in *Luscher* — now seem ironic in view of the level of complexity characterizing the Supreme Court of Canada judgments in *Towne Cinema Theatres Ltd. v. R.*, ante, p. 1, also [1984] 4 W.W.R. 1.

Don Stuart

Cases considered

Germany (Fed. Republic) and Rauca, Re (1983), 41 O.R. (2d) 225, 34 C.R. (3d) 97 (sub nom. *R. v. Rauca*), 4 C.C.C. (3d) 385, 145 D.L.R. (3d) 638, 4 C.R.R. 42 (C.A.) — referred to.

Gordon & Gotch (Can.) Ltd. v. M.N.R., [1978] 2 F.C. 603, 20 N.R. 467 (C.A.) — distinguished.

Knuller v. D.P.P., [1973] A.C. 435, [1972] 3 W.L.R. 143, 56 Cr. App. R. 633 (H.L.) — considered.

Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, rehearing denied 414 U.S. 881, 38 L. Ed. 2d 128, 94 S. Ct. 26 (1973) — considered.

Ont. Film & Video Appreciation Soc. and Ont. Bd. of Censors, Re (1983), 41 O.R. (2d) 583, 34 C.R. (3d) 73, 147 D.L.R. (3d) 58, 5 C.R.R. 373, affirmed 45 O.R. (2d) 80, 38 C.R. (3d) 271, 5 D.L.R. (4th) 766, 7 C.R.R. 129, 2 O.A.C. 388 (C.A.) [leave to appeal to S.C.C. granted 41 C.R. (3d) xxix, 3 O.A.C. 318, 55 N.R. 318] — followed.

Popert v. R. (1981), 19 C.R. (3d) 393, 58 C.C.C. (2d) 505 (Ont. C.A.) — distinguished.

Priape Enrg. v. Dep. M.N.R. (1979), 24 C.R. (3d) 66, 52 C.C.C. (2d) 44, 2 C.E.R. 169 (Que. S.C.) — referred to.

R. v. P., 3 C.R.N.S. 302, 63 W.W.R. 222, [1968] 3 C.C.C. 129 (Man. C.A.) — considered.

R. v. Rankine (Doug) Co. (1983), 36 C.R. (3d) 154, 9 C.C.C. (3d) 53 (Ont. Co. Ct.) — considered.

R. v. Robson (1985), 45 C.R. (3d) 36, 31 M.V.R. 220 (B.C.C.A.) — followed.

Southam Inc. and R., Re (1983), 41 O.R. (2d) 113, 34 C.R. (3d) 27, 33 R.F.L. (2d) 279, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408, 6 O.A.C. 1 (C.A.) — referred to.

Sunday Times v. U.K. (1979), 2 E.H.R.R. 245 — considered.

Statues considered

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, ss. 1, 2(*b*).

Criminal Code, R.S.C. 1970, c. C-34, ss. 158, 159(8).

Customs Act, R.S.C. 1970, c. C-40, ss. 47, 48(1) [am. R.S.C. 1970, c. 10 (2nd Supp.), s. 65 (Sched., Item 12)], 50 [am. 1974-75-76, c. 48, s. 25 (Sched. II, Item 2(1)); 1978-79, c. 11, s. 10 (Sched., Item 7(1), (2)); 1984, c. 41, s. 2 (Sched., Item 5(1))].

Customs Tariff, R.S.C. 1970, c. C-41, s. 14, Sched. C, Item 99201-1.

International conventions considered

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10.

[Note up with R11 Can. Abr. (2d) *Criminal Law (Revised)*, III, 5, a; III, 5, b, ii.]

APPEAL from judgment of British Columbia County Court Judge sitting as judge under Customs Act, 149 D.L.R. (3d) 243, affirming decision of deputy minister classifying magazines as "immoral or indecent" and prohibiting importation.

J.G. Ince, for appellant.

R. Tassé, Q.C., for respondent.

(No. A-1225-83)

14th March 1985. The judgment of the court was delivered by

HUGESSEN J.:— This is an appeal from a decision of Anderson Co. Ct. J. [149 D.L.R. (3d) 243], sitting as a "judge" as defined in s. 50 of the Customs Act, R.S.C. 1970, C-40, on an appeal, brought under s. 47 of that Act, from a decision of the deputy minister classifying a magazine, Ex. 1 herein, under tariff item 99201-1 of Sched. C of the Customs Tariff, R.S.C. 1970, C-41. Anderson Co. Ct. J. dismissed the appeal and confirmed the deputy minister's classification of the magazine in question as "immoral" or "indecent".

On the appeal to us, the appellant argued but faintly that Anderson Co. Ct. J. and the deputy minister had been wrong in the determination they had made and in the application of the "community standard of tolerance" test as established by the jurisprudence. It would be otiose to recite at length the cases in which that test was established and approved and I am quite satisfied that Anderson Co. Ct. J. correctly instructed himself in

law as to its nature and extent.

The magazine which is the subject matter of the litigation and the reasons for the appellant having it in his possession are succinctly and accurately summarized by the trial judge, as follows [p. 245]:

> The magazine in question is completely concerned with the sexual activity of a man and a woman from foreplay to orgasm. There are one or more colour photographs on each of the 40 pages (including the covers) and these photographs are accompanied by several hundred words of text, in narrative form, explicitly describing in grossly vulgar language the actions depicted in the photographs. These actions are in no way unnatural or unlawful and, indeed, they are a common part of the lives of Canadian men and women. It is conceded that the appellant had no intention of circulating or selling the magazine. He intended to use it in the privacy of his bedroom as a means of "fantasy enhancement".

The appeal to this court under s. 48(1) of the Customs Act being limited to questions of law and the material before the trial judge being more than adequate to support the determination which he made, I would not interfere with his decision that the deputy minister properly interpreted and applied the provisions of the Customs Tariff.

The principal thrust of the appeal to this court is not against the decision of the deputy minister, which was confirmed by Anderson Co. Ct. J., but against the legislation under which that decision was reached. The appellant argues that tariff item 99201-1 is an infringement upon the freedoms protected by s. 2(*b*) of the Canadian Charter of Rights and Freedoms and, as such, inoperative as not being saved by the excepting words of s. 1. The appellant does not argue that Parliament could not prohibit or regulate the importation of material of this sort, commonly described as "smut", but rather that the prohibition as drawn in the legislation is invalid. I am in agreement with that submission.

Tariff item 99201-1, read in conjunction with s. 14 of the Customs Tariff, prohibits the importation of:

> Books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character.

Section 2(*b*) of the Charter enshrines and protects as "fundamental" freedoms:

> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

That a prohibition whose first object is "books" is prima facie an infringement of the freedoms protected by s. 2(*b*) appears to me to be a proposition not requiring demonstration.

No freedom however, can be absolute and those guaranteed by the Charter are no exception. They are, by s. 1, subject to:

> [. . . such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

That text, in its turn, makes it clear enough that the task of demonstrating the justification for a limitation of a protected freedom falls upon government: see *Re Southam Inc. and R.* (1983), 41 O.R. (2d) 113, 34 C.R. (3d) 27, 33 R.F.L. (2d) 279, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408, 6 C.R.R. 1 (C.A.); *Re Germany (Fed. Republic) and Rauca* (1983), 41 O.R. (2d) 225, 34 C.R. (3d) 97 (sub nom. *R. v. Rauca*), 4 C.C.C. (3d) 385, 145 D.L.R. (3d) 638, 4 C.R.R. 42 (C.A.).

In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained , he is likely to be deterred from conduct which is in fact lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally-protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.

The experience of others is very helpful is this regard. Article 10 of the European Convention on Human Rights subjects freedom of expression to "such . . . restrictions . . . as are prescribed by law and are necessary in a democratic society". It may be noted that the convention does not in terms require that the restrictions be "reasonable".

In *Sunday Times v. U.K.* (1979), 2 E.H.R.R. 245 at 271, the European Court of Human Rights said:

> In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated

with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In the United States, the freedom of speech protection of the First Amendment is not specifically subject to limitations as in the Charter and the European Convention and it has fallen to the courts to define the extent of permissible legislative limits. In *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, rehearing denied 414 U.S. 881, 38 L. Ed. 2d 128, 94 S. Ct. 26 (1973), the Supreme Court at pp. 23-24 made it clear that specificity and foreseeability were the first requirements of any such limits:

> This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment . . . We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. The conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

And at p. 27:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

In this country, while experience with the Charter has necessarily been brief, the courts have already had occasion to impose minimum standards of certainty and foreseeability as a condition to a limitation on a protected freedom being sheltered by s. 1. In *Re Ont. Film & Video Appreciation Soc. and Ont. Bd. of Censors* (1983), 41 O.R. (2d) 583, 34 C.R. (3d) 73 at 83, 147 D.L.R. (3d) 58, 5 C.R.R. 373, the Ontario Divisional Court, dealing with a provin-

cial censorship statue, said:

> The next issue is whether the limits placed on the applicant's freedom of expression by the Board of Censors were "prescribed by law". It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms.
>
> The Crown has argued that the board's authority to curtail freedom of expression is prescribed by law in the Theatres Act, ss. 3, 35 and 38. In our view, although there has certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression of film-makers have not been legislatively authorized. The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal, for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

That decision was approved by the Court of Appeal in a judgment reported at 45 O.R. (2d) 80, 38 C.R. (3d) 271, 5 D.L.R. (4th) 766, 7 C.R.R. 129, 2 O.A.C. 388, where the court said at p. 131:

> We would go further than the Divisional Court on this issue. In our view, s. 3(2)(a), rather than being of "no force or effect", is *ultra vires* as it stands. The subsection allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limits on the Board of Censors. It clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words of s. 1 of the Charter — "subject only to such reasonable limits prescribed by law".

More recently still the British Columbia Court of Appeal struck down s. 214(2) of that province's Motor Vehicle Act, which permits a peace officer to suspend temporarily a driver's licence when the officer "has reason to suspect that the driver . . . has consumed alcohol": *R. v. Robson*, B.C.C.A., Vancouver No. C.A. 002682, 6th March 1985 (unreported) [now reported ante, p. 68, also 31 M.V.R. 220]. The principal grounds for the decision, as I read it, were that the provision was, in the words of Nemetz C.J.B.C. [at p. 72], "riddled with vagueness" and, in the words of Esson J.A. [at p. 82], "so hopelessly vague as to be incapable of

being a reasonable limit".

The respondent deputy minister argues that the provisions of tariff item 99201-1 are not in fact vague and that the words "immoral" and "indecent" have received judicial interpretation over the years so as to render their meaning reasonably certain. In this respect, he points to cases such as *Gordon & Gotch (Can.) Ltd. v. M.N.R.*, [1978] 2 F.C. 603, 20 N.R. 467 (C.A.), and *Popert v. R.* (1981), 19 C.R. (3d) 393, 58 C.C.C. (2d) 505 (Ont. C.A.).

In my view, decisions rendered prior to the coming into force of the Charter are of little help on the question of whether or not a limit on a Charter-protected right is reasonable. In pre-Charter days, courts had no mandate to refuse to apply a duly-enacted statute simply on the grounds that it was vague or uncertain. Their duty was, as best they could, to extract a meaning from the words used by Parliament and to apply it to the cases before them. That they generally (but not always) did so without complaining adds nothing to the debate. What has to be determined today is whether the words of tariff item 99201-1, together with any judicial gloss which has been placed on them, are sufficiently clear to constitute a "reasonable limit prescribed by law".

The first observation to be made in this regard is that the words "immoral" and "indecent" are nowhere defined in the legislation. This at once serves to distinguish the provisions of tariff item 99201-1 from the obscenity provisions of the Criminal Code, which contains in s. 159(8) words which might be thought to give to those provisions sufficient certainty and particularity.

Secondly, the words "immoral" and "indecent" are highly subjective and emotional in their content. Opinions honestly held by reasonable people will vary widely. The current public debate on abortion has its eloquent and persuasive adherents on both sides arguing that their view alone is moral, that of their opponents immoral. Standards of decency also vary even (or perhaps especially) amongst judges. The case of *R. v. P.*, 3 C.R.N.S. 302, 63 W.W.R. 222, [1968] 3 C.C.C. 129 (Man. C.A.), provides an interesting example of a learned and articulate debate between the present Chief Justices of Canada and Manitoba respectively as to whether an act of heterosexual fellatio performed in private (such as Ex. 1 herein depicts, amongst other things) was grossly indecent. (The case was, of course, decided prior to the enactment of the present s. 158 of the Criminal Code, by which Parliament legislated an end to the controversy.)

While obscenity under the Criminal Code is, by statutory definition, limited to matters predominantly sexual, there is no such limitation upon the concepts of immorality or indecency, and this is so notwithstanding the judicial gloss which has carried over into the test for immorality or indecency the test of community standards of tolerance. As stated by Lord Reid in *Knuller v. D.P.P.*, [1973] A.C. 435 at 458, [1972] 3 W.L.R. 143, 56 Cr. App. R. 633 (H.L.):

> Indecency is not confined to sexual indecency: indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting.

While it is, of course, true that the judicial overlay of the community standards of tolerance test has done something to reduce the inherent subjectivity of the words "immoral" and "indecent", this has, if anything, had the effect of increasing their uncertainty. Community standards themselves are in a constant state of flux and vary widely from place to place within the country. Yet the courts are obliged to apply a contemporary and nationwide standard. I need not repeat here what I had occasion to say in *Priape Enrg. v. Dep. M.N.R.* (1979), 24 C.R. (3d) 66, 52 C.C.C.(2d) 44, 2 C.E.R. 169 (Que. S.C.). It finds an eloquent echo, albeit in another context, in the words of Borins Co. Ct. J., in *R. v. Doug Rankine Co.* (1983), 36 C.R. (3d) 154 at 173, 9 C.C.C. (3d) 53 (Ont. Co. Ct.):

> In films of this nature it is impossible to define with any precision where the line is to be drawn. To do so would be to attempt to define what may be indefinable.

I would add that it is, of course, no answer to the argument that a limitation on freedom is so vague as to be unreasonable to say that this publication or that is so immoral or indecent that it clearly falls afoul of the prohibition. One might as well argue that the Tale of Peter Rabbit was clearly not immoral or indecent and could therefore be admitted. Even the most defective provision is unlikely to be so vague as not to permit the placing of some cases on one side of the line or the other. What is significant is the size and importance of the grey area between the two extremes. Vagueness or uncertainty, like unreasonableness, are not themselves absolutes but tests by which the courts must measure the acceptability of limits upon Charter-protected freedoms.

Finally, let it be quite clear that what the Charter protects in s. 2 (*b*) is not acts or deeds but thought, expression and depiction. While the activities shown in the subject magazine are probably,

as far as one can determine, legal, it would make no difference if they were crimes. The depiction of murder, real or imagined, is protected by s. 2 (*b*), but that does not mean that the Charter has declared open season for assassination.

I conclude that, insofar as it prohibits the importation of matters of immoral or indecent character, tariff item 99201-1 is not a reasonable limitation upon the freedoms guaranteed by s. 2(*b*) of the Charter and is of no force or effect.

In the light of that conclusion, it becomes unnecessary to deal with the appellant's request made at the hearing that we receive additional evidence relating to the testimony of the Crown's expert witness, Dr. Murray, and I would leave the questions raised by that request for another occasion.

I would allow the appeal, set aside the decision of Anderson Co. Ct. J. and vacate the decision of the deputy minister.

Appeal allowed: decision of deputy minister vacated.

FRANKLIN v. R.

Supreme Court of Canada, Dickson C.J.C., Estey, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

Heard — March 14, 1985.
Judgment — April 4, 1985.

Procedure — No loss of jurisdiction on adjournment and remand — Principle of loss of jurisdiction over offence where nothing done applying only to trials before magistrates — No loss of jurisdiction where indictment in Court of General Sessions of Peace not proceeding at time set for trial.

The principle that jurisdiction over the offence is lost where nothing is done applies only to trials held by magistrates sitting under Pt. XVI or XXIV of the Criminal Code. There is no loss of jurisdiction when a trial court, acting on an indictment, fails to proceed at the time set for trial, absent unconstitutional conduct.

Annotation

To assess the significance of this brief judgment it is necessary to examine prior law and also the *Franklin* case history.

There is a judge-made distinction between loss of jurisdiction over the person and loss of jurisdiction over the offence: see, for example, *R. v. Stedelbauer Chevrolet Oldsmobile Ltd.*, [1974] 6 W.W.R. 362, 19 C.C.C. (2d) 359 (Alta. C.A.).

transport. The distinction between the agreement for the transportation of goods and the bill of lading which evidences the terms of that agreement must be borne in mind. Failure to comply with s. 3(4) may comprise a breach of the regulation but that does not alter or detract from the limitation on liability imposed on the agreement to transport by the statutory deeming provision.

On a careful reading of the *Alberta Motor Transport Act* and its regulations regarding general hauling under s. 3 of the regulations, it is clear that the statutory limits on the carrier's liability in the event of loss or damage to goods in its possession are deemed to be a part of every agreement to transport, "unless a higher value is declared on the face of the bill of lading by the consignor". That is the scheme of the pertinent Alberta legislation regarding general hauling. Those limits are not absolute. The consignor may avoid having those statutory limits placed on his loss or damage by declaring a higher or true value of his goods. As in the *Anticosti* case, the onus is placed on the consignor to declare a higher value on his goods. If he fails to do so, his loss or damage will be limited as prescribed.

In the result, the appeal must succeed. The appellants' admitted liability for damages is limited to $1,400. Since the trial judge's direction regarding prejudgment interest was not challenged, that direction will apply to the sum of $1,400. The appellants will have one set of costs of this appeal in the appropriate column, no limiting rule to apply.

Appeal allowed.

Simmons v. The Queen

[Indexed as: R. v. Simmons]

Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain,* La Forest and L'Heureux-Dubé JJ. December 8, 1988.*

Constitutional law — Charter of Rights — Right to counsel — Customs search — Accused required to submit to strip search as result of customs officer's belief that carrying contraband — Accused not informed of right to retain and instruct counsel prior to submitting to search — Accused detained prior to search — Accused's right to be informed of right to retain and instruct counsel infringed — Customs Act, R.S.C. 1970, c. C-40, ss. 143, 144 — Canadian Charter of Rights and Freedoms, ss. 1, 10.

Constitutional law — Charter of Rights — Search and seizure — Customs search — Customs Act providing that customs officer may search any person seeking to enter Canada if officer has reasonable cause to suppose person

*Estey and Le Dain JJ. took no part in the judgment.

searched has goods subject to entry at customs or prohibited goods secreted about his person — Provisions not inconsistent with Charter of Rights guarantee against unreasonable search and seizure — Canadian Charter of Rights and Freedoms, s. 8 — Customs Act, R.S.C. 1970, c. C-40, ss. 143, 144.

Constitutional law — Charter of Rights — Search and seizure — Customs search — Manner of search — Accused required to submit to strip search when attempting to enter Canada at airport — Search authorized by statute where reasonable cause to suppose person carrying contraband on person — Accused not informed of right to counsel nor given explanation of right to have customs officers' superior or justice of the peace review grounds for search — Manner in which search executed unreasonable — Canadian Charter of Rights and Freedoms, ss. 1, 8 — Customs Act, R.S.C. 1970, c. C-40, ss. 143, 144.

Constitutional law — Charter of Rights — Enforcement of rights — Exclusion of evidence — Prior to being required to submit to strip search at airport accused not informed of right to retain and instruct counsel — Accused denied right to counsel — Quantity of narcotics seized as result of search — Manner in which search executed unreasonable — Admission of evidence would not however bring administration of justice into disrepute — Canadian Charter of Rights and Freedoms, ss. 8, 10, 24 — Customs Act, R.S.C. 1970, c. C-40, ss. 143, 144.

Upon her arrival at Toronto International Airport from Jamaica, the accused was required to attend first at a primary customs inspection and then at a secondary customs inspection. As a result of several factors including her appearance, lack of proper identification and a bulge in the area of her upper abdomen, a customs superintendent authorized a search of the accused's person. The accused was taken to a search room where her attention was directed to a sign on the wall which set out the provisions of ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40. Section 143 authorizes a customs officer to search any person if the officer has reasonable cause to suppose that the person searched has goods subject to entry at customs or prohibited goods secreted about his person. Section 144 provides that before any person can be searched the person may require the officer to take him before a magistrate, justice of the peace or chief officer at the port who if he sees no reasonable cause for search may discharge the person. There was no evidence that the accused read these signs and they were not read to her. She was then required to remove various pieces of her clothing which revealed adhesive tape bandages around her midriff area. At this point the accused asked if it was necessary for the search to continue and she was told that it was. When the bandages were removed it was revealed that she was carrying a quantity of *cannabis* resin. The accused was then arrested for importing narcotics and at that point informed of her right to retain and instruct counsel without delay. Prior to that time the accused had not been informed of her right to retain and instruct counsel. At trial the judge held that the accused was detained within the meaning of s. 10 of the *Canadian Charter of Rights and Freedoms* from the moment when she was taken into the search room for the body search and therefore should have been informed of her right to retain and instruct counsel. The trial judge excluded the evidence as to the finding of the narcotics. An appeal by the Crown to the Ontario Court of Appeal from the accused's acquittal was allowed and a new trial ordered.

On appeal by the accused to the Supreme Court of Canada, **held**, the appeal should be dismissed.

Right to counsel

Per Dickson C.J.C., Beetz, Lamer, Wilson and La Forest JJ. concurring: There are three distinct types of border search. First is the routine questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. A person subjected to this type of search could not be said to be detained within the meaning of s. 10(*b*) of the Charter. The second type of border search is the strip or skin search, of the nature to which the accused in this case was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is a body cavity search in which customs officers have recourse to medical doctors, X-rays and other highly invasive means. A person subjected to the second kind of search such as the accused in this case is detained within the meaning of s. 10(*b*). When the customs officer informed the accused that she was going to be searched the accused could not have refused and continued on her way. In addition, s. 203 of the *Customs Act* makes it an offence to obstruct or to offer resistance to any personal search authorized by the *Customs Act*. At the time of the search the accused was quite clearly subject to external restraint. The officer had assumed control over her movements by a demand which had significant legal consequences. While routine questioning by customs officers at the border or routine luggage searches conducted on a random basis do not constitute detention for the purpose of s. 10, when a person is taken out of the normal course and forced to submit to a strip search that person is detained within the meaning of s. 10. Further, it could not be said that counsel would perform no useful function in the situation. If the accused had been given the right to consult counsel, counsel could have informed her of her rights under s. 144 of the *Customs Act* requiring higher authorization for the search. The infringement of s. 10(*b*) was not a reasonable limit within the meaning of s. 1 of the Charter. The limit was not one imposed by law, but rather by the actions of the officers.

Per L'Heureux-Dubé J., McIntyre J. concurring: The accused in this case was not detained when she was required to submit to a strip search pursuant to s. 143 of the *Customs Act*. In applying s. 10 a distinction must be made between a search which occurs within Canada and one which occurs when an individual attempts to gain admission into the country. The individuals arriving at the border are subject to a form of restraint from the outset, in that they will be denied entry to the country until the immigration and customs officials are satisfied that they have the right to enter and that the goods and substances which they have in their possession are such as can be legally brought into Canada. The right to counsel is primarily aimed at preventing the accused or deterring the person from incriminating herself. Its main concern is with coerced or uninformed confessions. This is something which in the interests of fairness the right to counsel would seek to protect. However, a customs search occurs under circumstances where the person being searched is not in a position where she could manufacture evidence. A border search is not part of the criminal process but rather part of the process of entering into the country. The searched person's right to counsel would arise if and when she was placed under custody as part of the criminal process. Right to counsel can arise in searches which occur at ports of entry but only where the purpose of the detention, interrogation or search arises in criminal proceedings as distinct from those concerning entry into the country.

Search and seizure

Per Dickson C.J.C., Beetz, Lamer and La Forest JJ. concurring: Former sections 143 and 144 of the *Customs Act* do not violate the guarantee to security against unreasonable search and seizure in s. 8 of the Charter. The reasonableness of border searches within the meaning of s. 8 must be treated differently from searches occurring in other circumstances. The degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries for the general welfare of the nation. Travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process typically requires the production of proper identification and travel documentation and involves a search process beginning with the completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods. Routine questioning by customs officers, search of luggage, frisk or pat searches and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges permitted by ss. 143 and 144 of the *Customs Act* are not unreasonable. The *Customs Act* searches of the person are not routine but are performed only after customs officers have formed reasonable grounds for supposing that a person has contraband secreted about her body. The decision to search is subject to review at the request of the person to be searched and the searches are conducted in private search rooms by officers of the same sex. Thus, although ss. 143 and 144 do not mandate prior authorization of personal searches, the standard upon which the search may be conducted under these sections is merely reasonable cause to suppose, and they have no warrant requirement, nevertheless the sections do not infringe s. 8.

However, the search in this case was not conducted in a reasonable manner. In this respect the right to counsel had an important impact on the execution of the search. Had the accused been informed of her right to counsel she might have had the benefit of legal advice. Counsel could have dispelled the accused's uncertainties surrounding the search and also ensured that the statutory standard of reasonable cause to suppose had been satisfied. The denial of the right to counsel in this case in conjunction with the absence of any explanation to the accused of her rights under the *Customs Act* rendered the search unreasonable. Violation of the right to counsel deprived the accused of her ability to exercise a legal right provided in the *Customs Act*. A search that might not have been conducted had the accused had the benefit of legal advice was performed in circumstances in which the accused was ignorant of her legal position. Further, like the violation of the accused's right to counsel, violation of her right to protection against unreasonable search and seizure could not be justified under s. 1. The violation of the right to be secure against unreasonable search and seizure resulted from the actions of customs officers and was not a limitation imposed by law.

Per Wilson J.: While ss. 143 and 144 of the *Customs Act* are not inconsistent with s. 8 of the Charter, the strip search conducted in this case was unreasonable by reason of the violation of the accused's right to counsel under s. 10(*b*). Sections 143 and 144 do not contain any limit on an accused's s. 10(*b*) rights and no such limitation is implied from their operating requirements. The violation of the accused's s. 10(*b*) rights prior to the search renders the search unconstitutional

given the complete compatibility of the authorizing statutory search provisions with the right to retain and instruct counsel without delay. An unconstitutional search cannot be a reasonable one. Further, the manner in which the search was conducted was also unreasonable. It is unreasonable for a detained person to be simply directed to a sign on the wall of a search room setting out the legal provisions which authorize a search of her person. A person who is detained and about to be searched can hardly be expected to be her own lawyer. Recourse to legal assistance in such circumstances will often be essential in order to ensure that citizens are protected from unreasonable searches and seizures. As the circumstances of this case showed, the right to counsel could be highly useful in facilitating the effective and fair operation of the statutory search provisions, in particular, the higher authorization procedure provided for in s. 144.

Per L'Heureux-Dubé J., McIntyre J. concurring: Sections 143 and 144 of the *Customs Act* are not unreasonable and therefore do not infringe s. 8 of the *Canadian Charter of Rights and Freedoms*. Further, the accused was sufficiently informed of her right to appeal the search to a higher customs authority when she was shown the text of ss. 143 and 144. Because of this and because the accused was not detained within the meaning of s. 10(*b*) of the Charter it could not be said that the search was conducted in an unreasonable manner.

Admissibility of evidence

Per Dickson C.J.C., Beetz, Lamer, Wilson and La Forest JJ. concurring: Notwithstanding violation of the accused's rights under ss. 8 and 10(*b*) of the Charter the evidence in this case should not be excluded under s. 24(2) of the Charter. The factors to be balanced in determining whether introducing the evidence into the proceedings would bring the administration of justice into disrepute can be divided into three groups based on their effect on the repute of the justice system. The first set of factors are those relevant to the fairness of the trial. Admission of evidence that might in some way affect the fairness of the trial would tend to bring the administration of justice into disrepute and in general should be excluded. The admission of the evidence in this case, however, would not tend to affect adversely the fairness of the trial process. The accused was in no way conscripted against herself. The second set of factors concerns the seriousness of the Charter violation as defined by the conduct of the law enforcement authorities. In this category an assessment of whether the breach was committed in good faith, whether it was one of a merely technical nature or whether it was deliberate and flagrant falls to be considered. Also to be considered is whether the Charter violation was motivated by circumstances of urgency or from fear of destruction of evidence and whether the evidence could have been obtained without infringing the Charter. Here the customs officers acted in good faith based on accepted customs procedure and there was nothing deliberate or blatant in the denial of the accused's rights. The third set of factors recognizes the possibility that the administration of justice could be brought into disrepute by excluding evidence despite the fact that it was obtained in a manner that infringed the Charter. In some cases the harm to the integrity of the judicial system resulting from excluding the evidence would be so great that exclusion and not admission will bring the administration of justice into disrepute. This would be the case if evidence necessary to substantiate a charge were excluded on the basis of a trivial Charter violation. In this case there were ample objective articulable facts to support the customs officer's suspicion that the accused was concealing something on her body for the purpose of bringing it into Canada illegally. The evidence obtained as a result of the search was real evidence that existed irrespective of the Charter violations. Although the breach of

the accused's rights were not, strictly speaking, trivial, this was the kind of case where the evidence should be admitted. Exclusion of the evidence would tend to bring the administration of justice into disrepute.

R. v. Therens (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 40 Sask. R. 122, 13 C.R.R. 193, 32 M.V.R. 153, 59 N.R. 122; *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 28 C.R.R. 122, 74 N.R. 276, **apld**

Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 55 A.R. 291, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 9 C.R.R. 355, 84 D.T.C. 6467, 55 N.R. 241, *sub nom. Director of Investigation & Research of Combines Investigation Branch v. Southam Inc.*, **distd**

U.S. v. Ramsey, 431 U.S. 606 (1977); *Carroll v. U.S.*, 267 U.S. 132 (1925), **consd**

Other cases referred to

Chromiak v. The Queen (1979), 49 C.C.C. (2d) 257, 102 D.L.R. (3d) 368, [1980] 1 S.C.R. 471, 12 C.R. (3d) 300, 24 A.R. 206, 11 Alta. L.R. (2d) 295, 3 M.V.R. 69, 29 N.R. 441; *U.S. v. Lincoln*, 494 F.2d 833 (1974); *U.S. v. Chavarria*, 493 F. 2d 935 (1974); *U.S. v. King*, 485 F. 2d 353 (1973); *U.S. v. Beck*, 483 F.2d 203 (1973); *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398, [1988] 1 S.C.R. 621, 63 C.R. (3d) 14, 32 C.R.R. 193, 4 M.V.R. (2d) 170, 84 N.R. 365; *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1, 32 C.R.R. 257, 4 M.V.R. (2d) 185, 84 N.R. 347; *R. v. Rodenbush and Rodenbush* (1985), 21 C.C.C. (3d) 423, 47 C.R. (3d) 10, 16 C.R.R. 91; *R. v. Jacoy* (1988), 45 C.C.C. (3d) 46, revg 30 C.C.C. (3d) 9; *R. v. Gladstone* (1985), 22 C.C.C. (3d) 151, 47 C.R. (3d) 289, [1985] 6 W.W.R. 504, 18 C.R.R. 99; *R. v. Jordan* (1984), 11 C.C.C. (3d) 565, 39 C.R. (3d) 50; *R. v. Jagodic and Vajagic* (1985), 19 C.C.C. (3d) 305, 68 N.S.R. (2d) 271, 15 C.R.R. 146; *Weeks v. U.S.*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *R. v. Wray*, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272, 11 C.R.N.S. 235; *U.S. v. Guadalupe-Garza*, 421 F. 2d 876 (1970); *R. v. Dumas* (1985), 23 C.C.C. (3d) 366, 66 A.R. 137, 41 Alta. L.R. (2d) 348, 26 C.R.R. 161; *Sieben v. The Queen* (1987), 32 C.C.C. (3d) 574, 38 D.L.R. (4th) 427, [1987] 1 S.C.R. 295, 56 C.R. (3d) 225, [1987] 3 W.W.R. 722, 13 B.C.L.R. (2d) 30, 28 C.R.R. 145, 74 N.R. 271; *Hamill v. The Queen* (1987), 33 C.C.C. (3d) 110, 38 D.L.R. (4th) 611, [1987] 1 S.C.R. 301, 56 C.R. (3d) 220, [1987] 3 W.W.R. 726, 13 B.C.L.R. (2d) 24, 28 C.R.R. 148, 75 N.R. 149; *Clarkson v. The Queen* (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 69 N.B.R. (2d) 40, 19 C.R.R. 209, 66 N.R. 114

Statutes referred to

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*c*)
Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10(*b*), 12, 24
Constitution Act, 1982, s. 52(1)
Criminal Code, s. 618(2)(*a*) (am. 1974-75-76, c. 105, s. 18)
Customs Act, S.C. 1867, c. 6, s. 93
Customs Act, R.S.C. 1970, c. C-40, ss. 143, 144, 203
Customs Act, S.C. 1986, c. 1, s. 98
Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 4(2), 5(1)

APPEAL by the accused from a judgment of the Ontario Court of

Appeal, 11 C.C.C. (3d) 193, 7 D.L.R. (4th) 719, 45 O.R. (2d) 609, 26 M.V.R. 168, 39 C.R. (3d) 223, 8 C.R.R. 333, 7 C.E.R. 159, allowing an appeal by the Crown from the accused's acquittal, 5 C.E.R. 396, on charges of importing narcotics and possession of narcotics for the purpose of trafficking.

B.A. Fox and *C.J. Arnup*, for accused, appellant.
J.E. Thompson and *J.W. Leising*, for the Crown, respondent.
S.C. Hill, for Attorney-General of Ontario.

DICKSON C.J.C.:—The appellant, Laura Mary Simmons, was indicted on two drug counts: (i) that she unlawfully "did, at the City of Mississauga, in the Judicial District of Peel and Province of Ontario, on or about the 14th day of November in the year 1982, import into Canada a Narcotic, to wit: Cannabis sativa, its preparations, derivatives and similar synthetic preparations, namely Cannabis resin", contrary to s. 5(1) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and (ii) that she unlawfully did, at the same place and date, "have in her possession a Narcotic for the purpose of trafficking, to wit: Cannabis sativa, its preparations, derivatives and similar synthetic preparations, namely Cannabis resin", contrary to s. 4(2) of the *Narcotic Control Act*. Drugs, contained in a body pack taped to her waist, were found on the person of the appellant by customs officers at Toronto International Airport. The trial judge ruled the evidence of the drugs, seized as a result of a body search, inadmissible, and found the appellant not guilty on both counts in the indictment.

Appellant's acquittal at trial was reversed on appeal and she has now appealed as of right to this court, pursuant to s. 618(2)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34.

The principal issues in the case are whether the appellant's rights under ss. 10(*b*) and 8 of the *Canadian Charter of Rights and Freedoms* were violated when she was subjected to a strip search at customs and, if so, whether evidence of narcotics obtained as a result of the search should be excluded under s. 24(2) of the Charter. These raise the following subsidiary issues: whether a strip search by customs officers constitutes a "detention" and thus gives rise to the right to retain and instruct counsel and to be informed of that right under s. 10(*b*) of the Charter; whether the personal search provisions (ss. 143 and 144) in the former *Customs Act*, R.S.C. 1970, c. C-40, are inconsistent with a person's right to be secure against unreasonable search and seizure as guaranteed by s. 8 of the Charter, and thereby, by reason of s. 52 of the *Constitution Act, 1982*, of no force or effect

to the extent of the inconsistency; and whether the violations, if any, of ss. 10(*b*) or 8 may be justified under s. 1 of the Charter.

The statutory provisions to which reference is made in the foregoing paragraph read as follows:

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . . . . .

8. Everyone has the right to be secure against unreasonable search or seizure.

. . . . . .

10. Everyone has the right on arrest or detention

. . . . . .

(*b*) to retain and instruct counsel without delay and to be informed of that right;

. . . . . .

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Constitution Act, 1982

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Customs Act

143. Any officer, or person by him authorized thereunto, may search any person on board any vessel or boat within any port in Canada, or on or in any vessel, boat or vehicle entering Canada by land or inland navigation, or any person who has landed or got out of such vessel, boat or vehicle, or who has come into Canada from a foreign country in any manner or way, if the officer or person so searching has reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his person.

144(1) Before any person can be searched, the person may require the officer to take him before a police magistrate or justice of the peace, or before the collector or chief officer at the port or place, who shall, if he sees no reasonble cause for search, discharge the person, but, if otherwise, he shall direct the person to be searched; but where the person is a female she shall be searched by a female, and any such magistrate, justice of the peace or collector may, if there is no female appointed for such purpose, employ and authorize a suitable female person to act in any particular case or cases.

If one traces ss. 143 and 144 as far back as Confederation one will find that the sections contained in the 1867 *Customs Act* (S.C. 1867, c. 6, s. 93(1) and (2)) are virtually the same as those in the 1970 Act. Both permit a search of the person when the customs officer "has reasonable cause to suppose that the person searched" has "prohibited goods, secreted about his person". In addition, both versions stipulate that a person may request to be brought before a justice of the peace, or before the collector or chief officer of the customs office for a second authorization before the search is performed. The 1970 provision adds a police magistrate to the list of officials who can give a second authorization.

Sections 143 and 144 have since been repealed and replaced by s. 98 of the *Customs Act*, S.C. 1986, c. 1. That section changes the standard of suspicion to "reasonable grounds" and narrows the number of persons before whom a person about to be searched may be brought, to the senior officer at the place the search is to take place.

I *Facts*

The appellant arrived at the Toronto International Airport on the evening of November 14, 1982, on Air Jamaica flight 071 from Jamaica. She proceeded to the primary customs inspection and was asked a series of standard questions by the customs officer. The appellant identified herself as "Maureen Claudia" Simmons, stated that she lived in Montreal, and declared a total of $25 as the value of all goods she was bringing into the country. Finding the appellant to be "overly nervous and jittery and a bit agitated", the primary customs officer concluded she should be referred for a secondary inspection and gave the appellant an inspection card bearing the number "86". The number 8 represented the code indicating the traveller should be referred to secondary inspection. The number 6 indicated that the primary inspector had doubts about the goods the passenger had declared.

The secondary customs officer, Inspector Kathy Badham, asked the appellant for identification and conducted a search of the appellant's luggage. The appellant produced a photocopy of her baptismal certificate and stated that the rest of her indentification had been stolen in Montreal. The search of the appellant's luggage did not reveal contraband. At some point during the secondary inspection, the appellant indicated that she was an unemployed, free-lance commercial artist. The secondary inspector was suspicious of the appellant and requested permission from the customs superintendent to search the appellant's person. The suspicions

were based on the primary inspector's doubts about the appellant, dissatisfaction with the appellant's identification, and the secondary inspector's observation that the appellant, although otherwise very slender, was slightly heavy and bulging in the area of her upper abdomen.

The secondary inspector informed the appellant that she was going to be searched as permitted by the *Customs Act* and together with another female customs officer showed the appellant into a search room located behind the secondary search area. She asked the appellant if she was hiding anything and the appellant responded that she was not. The officer then drew the appellant's attention to a sign on the wall of the search room which set out ss. 143 and 144 of the *Customs Act* quoted earlier. These sections, the inspector advised the appellant, provided the authority for conducting personal searches. There is no indication that the appellant read the provisions.

The secondary inspector told the appellant to undress. The appellant complied, removing her jacket, dress, and blouse. The inspector thought she saw something concealed underneath the appellant's girdle and again asked the appellant if she was hiding anything. Again the appellant responded that she was not. The appellant then removed her girdle, revealing white adhesive bandages around her midriff. When questioned about the bandages, the appellant responded that they were for her back. The inspector asked the appellant to remove the bandages. The appellant replied "is this really necessary?" then complied with the request. Removal of the bandages revealed six plastic bags containing 1.98 kilograms of *cannabis* resin, otherwise known as hashish oil, with a street value of $22,000. The appellant was then arrested for importing narcotics and was informed of her right to retain and instruct counsel. She forthwith telephoned counsel.

As Howland C.J.O. noted in the Court of Appeal, by agreement of counsel at trial, evidence was furnished that between April 1, 1982 and March 31, 1983, there were 442 drug seizures at the Toronto International Airport, of which 80% were *cannabis* seizures from flights originating in Jamaica.

II *The trial*

At trial before Kent Co. Ct. J., the appellant argued that because of the small amount of narcotics involved and the surrounding circumstances of the offence, prosecuting the appellant for importing narcotics and for trafficking rather than lesser charges constituted unfair treatment, violating appellant's

rights under ss. 7 and 12 of the Charter. The appellant also alleged that searches made pursuant to s. 143 of the *Customs Act* infringed s. 8 of the Charter, that there were no grounds under s. 143 for searching the appellant, that the appellant was arbitrarily detained in violation of s. 9 of the Charter, and that because the appellant had not been informed of her right to retain and instruct counsel before she was searched, s. 10(*b*) of the Charter had been infringed.

In a judgment rendered on May 13, 1983, and reported at 5 C.E.R. 396, Kent Co.Ct.J. found the appellant not guilty of the charges. The judgment was based on the s. 10(*b*) argument only. It will be recalled that s. 10(*b*) of the Charter, quoted earlier, assures everyone the right "on arrest or *detention*" to retain and instruct counsel without delay, and to be informed of that right. The judge held that the appellant had been detained from the moment she was taken into the search room for a body search, as she was then subject to compulsory restraint. In coming to this conclusion he emphasized the testimony of the inspector who conducted the search who stated that in her view the appellant had been detained in her custody and was not free to leave the search room. The appellant, the judge felt, should therefore have been informed of her right to retain and instruct counsel before the search was conducted and, as she had not been so informed, her right under s. 10(*b*) of the Charter had been violated.

The trial judge excluded the evidence under s. 24(2) of the Charter, holding that in all the circumstances its admission into the proceedings would bring the administration of justice into disrepute. The judge pointed out that if the appellant had been advised of her Charter rights before the search, she might well have telephoned her lawyer who could have advised her to request that she be brought before a justice of the peace, police magistrate or chief customs officer pursuant to s. 144. In the opinion of the judge this took on particular significance in this case because of the limited evidence in support of the "reasonable cause" for a search as required by s. 143 of the *Customs Act*. He concluded, therefore, that the discovery of the illicit drugs was not inevitable and might not have taken place if the appellant's s. 10(*b*) rights had not been infringed. He found the appellant not guilty as charged.

The Ontario Court of Appeal

A five-member panel of the Ontario Court of Appeal reversed Kent Co. Ct. J.'s decision, Tarnopolsky J.A. dissenting in part: 11

C.C.C. (3d) 193, 7 D.L.R. (4th) 719, 45 O.R. (2d) 609. Howland C.J.O. for the majority held that the appellant had not been detained when she was subjected to a strip search at the border. In his view, the word "detention" in s. 10 of the Charter was to be accorded the meaning given to that word in s. 2(*c*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, by this court in *Chromiak v. The Queen* (1979), 49 C.C.C. (2d) 257, 102 D.L.R. (3d) 368, [1980] 1 S.C.R. 471 (S.C.C.). It should be noted that the Court of Appeal did not have the benefit of this court's decision in *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613 (S.C.C.). Howland C.J.O. also considered the American jurisprudence on border searches. He noted that American courts have considered border searches to be an exception to the protection against search and seizure embodied in the Fourth Amendment of the Constitution of the United States. Howland C.J.O. shared the view that customs searches constitute a distinct type of involvement with the individual and for that reason should be regarded differently. He stated at pp. 214-5 C.C.C., pp. 740-1 D.L.R.:

> In my opinion, border searches for contraband fall into a very special category. If a person reasonably arouses suspicion by giving the appearance of concealing something on his or her person, then he or she must expect to be asked to remove sufficient clothing to confirm or dispel this suspicion. There is nothing demeaning about such a request. The respondent was only requested to remove such of her clothing as was necessary to disclose that she was concealing illegal drugs. She was not touched in any way by Inspector Badham. The very large number of illegal drug seizures at the Toronto International Airport arising from Jamaica flights is indicative of the magnitude of the problem.
>
> It would be wrong to conclude that the brief restraint involved in the ordinary progressive border search for contraband conducted by a customs officer pursuant to ss. 143 and 144 of the *Customs Act* constitutes a detention within the meaning of s. 10 of the Charter.

Howland C.J.O. also noted that s. 143 of the *Customs Act* formed part of comprehensive border regulation to which both citizens and non-citizens alike were subject when seeking to enter Canada from abroad.

Howland C.J.O. found no merit to the appellant's argument that ss. 143 and 144 of the *Customs Act* violated s. 8 of the Charter. In his view, a body search conducted under ss. 143 and 144 should not be considered to be unreasonable within s. 8 of the Charter. He stated at p. 220 C.C.C., p. 746 D.L.R.:

> I do not think it is unreasonable for sovereign nations, such as Canada, to provide for a temporary restraint on persons entering the country, and if necessary, for a search of their persons to see if they are bringing contraband into Canada.

Despite his finding that the appellant was not detained and therefore that her right to counsel under s. 10(*b*) of the Charter had not been infringed, Howland C.J.O. went on to consider the appellant's arguments with respect to s. 24(2). In considering the test for whether the admission of evidence would bring the administration of justice into disrepute, he enunciated the following factors: the nature of the illegality, the manner in which the evidence was obtained, the good faith of the persons who obtained the evidence, whether the accused's rights under the Charter were knowingly infringed, and the seriousness of the charge. In this case, Howland C.J.O. was of the view that all the factors militated towards admitting the evidence. The search occurred at the border and was specifically authorized by an Act of Parliament. It was not unreasonable and did not involve any unnecessary invasion of privacy. The customs officers acted in good faith and fully in accordance with the law as stated in the *Customs Act*. The seizure of drugs was sizable and the charges faced by the accused serious. Accordingly, the admission of the evidence would in no way shock the community. On the contrary, exclusion of the evidence would bring the administration of justice into disrepute.

Tarnopolsky J.A. agreed that the evidence in this case should not have been excluded by the trial judge but dissented on the question of detention. In his view, *Chromiak*, *supra*, dealt only with the question of roadside breath tests and did not determine whether a person who is required to submit to an examination by a government agency is detained. He also distinguished strip searches at customs from roadside breath-testing on two grounds. In *Chromiak* the accused was free to leave the scene after refusing to take a breath test; the appellant in this case was not free to refuse to be subjected to a body search. Secondly, the search involved in this case was a far more serious intrusion into a person's dignity and privacy than the breath test contemplated in *Chromiak*. The highly intrusive nature of the search and the fact that it was performed under conditions of restraint compelled Tarnopolsky J.A. to the conclusion that the appellant was detained when she was strip-searched and, accordingly, her right to counsel had been infringed.

III *Interventions and constitutional questions*

The Attorneys-General of Ontario and Alberta filed notice of intention to intervene in the appeal to this court. The Attorney-General of Alberta later withdrew. The Attorney-General of Ontario filed a factum in support of the respondent Crown.

Prior to hearing the appeal the following constitutional questions were stated:

1. Is a person who is required by a customs officer upon entering Canada to submit to a search of his or her person for contraband which is suspected of being secreted about his or her person, such search being pursuant to ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, detained within the meaning of s. 10 of the *Canadian Charter of Rights and Freedoms*, thereby requiring that such person be informed of the right to retain and instruct counsel without delay?

2. Are ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, inconsistent with a person's right to be secure against unreasonable search and seizure as guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*, and thereby of no force and effect to the extent of that inconsistency?

3. If a failure to inform a person who is searched pursuant to ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, of his or her right to retain and instruct counsel without delay is in violation of s. 10 of the *Canadian Charter of Rights and Freedoms*, is such a violation justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. If ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, are found to be inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms*, are these sections justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

IV *Customs searches*

In this court counsel for the appellant advanced two main arguments. It was submitted that the appellant was "detained" when she was required to undergo a body search and thus her right to retain and instruct counsel and to be informed of that right under s. 10(*b*) was infringed. Secondly, counsel contended that ss. 143 and 144 of the *Customs Act* were inconsistent with the right to be secure against unreasonable search and seizure guaranteed by s. 8 of the Charter. It was submitted that neither violation could be saved by s. 1. On the basis of these violations, counsel for the appellant contended that admission of the narcotics into evidence would bring the administration of justice into disrepute under s. 24(2) of the Charter.

Crown counsel took the position that the appellant had not been detained and that ss. 143 and 144 of the *Customs Act* were not inconsistent with s. 8 of the Charter. Both arguments were largely based on characterizing border searches as a special case. Accordingly, the respondent argued that the brief restraint involved in the ordinary progressive border search conducted pursuant to *Customs Act* did not constitute detention within the meaning of s. 10 of the Charter. Similarly, though conceding that the search provisions in ss. 143 and 144 did not conform to the

criteria established by this court in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145 (S.C.C.), the Crown contended that *Hunter v. Southam Inc.* was inapplicable to the border search situation.

Before turning to the specific Charter issues, it is useful to consider briefly the significance of the border-crossing situation. The respondent stressed that customs searches should be treated differently because of the important national interest that border regulation serves. In the respondent's submission, strip searches such as the one to which the appellant was subjected, are reasonable in the circumstances of monitoring the goods that enter the country. The delay travellers experience when required to undergo a personal search is incidental to the reasonable progression of increasingly more intrusive border searches and for that reason does not constitute a detention within the meaning of s. 10 of the Charter.

The American courts have long recognized border situations as an exception to the general protection against unreasonable search and seizure of the Fourth Amendment. The First Congress of the United States passed a customs statute in 1789 exempting border searches from the requirement of probable cause: LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 2nd ed. (1987), vol. 3, at p. 710. This was the same Congress which two months later proposed the American Bill of Rights including the Fourth Amendment. Border regulation legislation similar to this first statute has existed in the United States since the original enactment.

The United States Supreme Court did not have cause to pronounce directly upon the constitutional validity of the search provisions in American customs legislation until 1977 in *U.S. v. Ramsey*, 431 U.S. 606 (1977), a case concerning the search of international mail. Lower courts had, however, consistently upheld the validity of customs provisions which permitted border searches to be conducted without securing a warrant and without establishing probable cause: La Fave, at p. 712; see *U.S. v. Lincoln*, 494 F. 2d 833 (9th Cir. 1974); *U.S. v. Chavarria*, 493 F. 2d 935 (5th Cir. 1974); *U.S. v. King*, 485 F. 2d 353 (10th Cir. 1973); *U.S. v. Beck*, 483 F.2d 203 (3d Cir. 1973). Dicta in Supreme Court decisions drew a distinction between searches within national boundaries, which were generally subject to the warrant and probable cause requirements of the Fourth Amendment, and those occurring at the border which required neither. In *Carroll v. U.S.*, 267 U.S. 132 (1925), a case heard during the era of prohi-

bition, the Supreme Court succinctly stated the essential difference between searches of persons presenting themselves for entry at the border and persons already in the country (at pp. 153-4):

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.* But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

(Emphasis added.) *Carroll* clearly indicated that the national interest in preventing the entry of contraband into the country made searches which would be unreasonable in other circumstances reasonable at the border.

In *Ramsey, supra*, the Supreme Court was finally confronted with a Fourth Amendment challenge to customs search provisions. Justice Rehnquist, for the court, commented at some length on the special nature of customs searches at pp. 616-7:

> That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed . . .". The acknowledgment of plenary customs power was differentiated from the more limited power to enter and search "any particular dwelling-house, store, building or other place . . ." where a warrant upon "cause to suspect" was required. The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest.

After reviewing other United States Supreme Court cases in which border situations had been mentioned, Justice Rehnquist came to the following conclusion on the validity of border searches at p. 619:

> Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search

depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We affirm it now.

While we must, of course, be wary of adopting American interpretations where they do not accord with the interpretive framework of our Constitution, the American courts have the benefit of 200 years of experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country.

It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.

I wish to make it clear that each of the different types of search raises different issues. We are here concerned with searches of the second type and what I have to say relates only to that type of search. Searches of the third or bodily cavity type may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection. I turn now to a consideration of the appellant's specific Charter claims.

V *Section 10 of the Charter*

The first issue to be determined in this appeal is whether the appellant was detained within the meaning of s. 10 of the Charter when she was required to undergo a strip search at customs. As noted, s. 10(*b*) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. If the appellant was detained, her right to

retain and instruct counsel was violated since she was not informed of that right until the narcotics were found.

In *R. v. Therens*, *supra*, this court considered the meaning of detention in the context of a breathalyzer demand made by a police officer under the former s. 235 of the *Criminal Code*. Le Dain J. made the following comments, in which all members of the court concurred at pp. 503-4 C.C.C., p. 678 D.L.R., pp. 641-2 S.C.R.:

> The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 — arrest and detention — are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s. 10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

From the foregoing passage it is clear that the right to counsel becomes available upon something less than formal arrest. This court has recently affirmed this definition of detention in *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398, [1988] 1 S.C.R. 621, 63 C.R. (3d) 14 (S.C.C.), and *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1 (S.C.C.).

Counsel for the Crown argued before this court that the definition of detention in *Therens* was inappropriate in the circumstances of border searches. It was the Crown's submission that the liberty of travellers is subject to physical constraints that may have significant legal consequences from the moment travellers arrive at the border requesting entry into Canada; detention should not be interpreted to include the ordinary, increasingly more intrusive course of border searches for contraband. Strip searches fall within this routine procedure. Detention within the meaning of s. 10 of the Charter would not be reached until an agent of the state imposed a restraint on a person's liberty beyond the normal restraints involved in ensuring that the person and his or her goods are lawfully admissible. In Crown counsel's submission, this level of restaint was not reached in this case.

Only a few lower courts have considered the issue of detention in the context of a search at customs. In *R. v. Rodenbush and Rodenbush* (1985), 21 C.C.C. (3d) 423, 47 C.R. (3d) 10, 16 C.R.R. 91 (B.C.C.A.), the British Columbia Court of Appeal held on the authority of *Therens*, *supra*, that persons required to wait in an inspection room while their luggage was inspected in another room were detained. In *Rodenbush* the accused, a married couple, had been under police surveillance while in Seattle. Before the couple arrived at the Canadian border, United States drug enforcement personnel warned Canadian customs officials of their impending arrival. When they reached customs, the accused declared purchases of approximately $70 worth of clothing and were referred to the customs building to pay duty. The officer to whom the accused made the payment requested to inspect their car. Two suitcases which the accused had been given in Seattle while under surveillance were in the back of the car. The officer removed and opened the suitcases and noticed deep gouges on some of the rivets inside one of them. The officer indicated that he wished to inspect the suitcases further and took them to an inspection room where he left them with other inspectors. The officer then led the accused to a second inspection room where he waited with them for the results of the luggage inspection. The search of the suitcases yielded 4.22 kilograms of cocaine with a purity of 76% by weight and a street value of more than $1.6 million.

While awaiting the outcome of the luggage search, the inspector carried on a conversation with the accused. When the cocaine was discovered, a customs superintendent notified the inspector of the find and asked him to question the accused about the suitcases. The accused made a false statement concerning where they had acquired the suitcases. The inspector then informed them of the discovery of cocaine and placed them under arrest. The British Columbia Court of Appeal held that the accused were detained within the meaning of s. 10 of the Charter when they were asked by the customs officer to enter a separate interview room.

The British Columbia Court of Appeal has considered the question of detention in the customs setting on two other occasions. In *R. v. Jacoy* (judgment being rendered this date [now reported 45 C.C.C. (3d) 46]), the accused was being monitored by the police for involvement in drug trafficking. As he proceeded north from Seattle towards the Canadian border, the R.C.M.P. contacted customs and suggested they flag the accused for a routine search. The accused was not to know customs had any suspicions about him. Cronin Prov. Ct. J. (reasons unreported)

held that Jacoy was detained from the moment he was stopped at the border. He excluded the narcotics under s. 24(2) of the Charter on the basis of the s. 10(*b*) violation and acquitted the accused. The case was reversed on appeal to the British Columbia Court of Appeal (reported at 30 C.C.C. (3d) 9) on other grounds and was argued before this court on the same day as the instant appeal. In *R. v. Gladstone* (1985), 22 C.C.C. (3d) 151, 47 C.R. (3d) 289, [1985] 6 W.W.R. 504 (B.C.C.A.), the British Columbia Court of Appeal assumed without deciding that an accused who had been subject to a strip search had been detained within the meaning of s. 10 of the Charter.

In my view, the appellant was detained when she was required to undergo a strip search pursuant to s. 143 of the *Customs Act*. This result is consistent with both the meaning given to detention in common parlance and with the definition laid out by Le Dain J. in *Therens*, *supra*. When the customs officer informed the appellant that she was going to be searched, the appellant could not have refused and continued on her way. The customs officer testified that had the appellant attempted to leave, she would have notified the R.C.M.P. In addition, s. 203 of the *Customs Act* makes it an offence to obstruct or to offer resistance to any personal search authorized by the *Customs Act*. At the time of the search the appellant was quite clearly subject to external restraint. The customs officer had assumed control over her movements by a demand which had significant legal consequences.

I am not persuaded by the argument made before us by the Crown that if a strip search is considered a detention, all travellers passing through customs must be seen to be detained and therefore, to have a right to counsel. In *Therens*, *supra*, Justice Le Dain stated that not all communication with police officers and other state authorities will amount to detention within the meaning of s. 10(*b*) of the Charter. This statement is equally valid with respect to the customs situation. I have little doubt that routine questioning by customs officials at the border or routine luggage searches conducted on a random basis do not constitute detention for the purposes of s. 10. There is no doubt, however, that when a person is taken out of the normal course and forced to submit to a strip search, that person is detained within the meaning of s. 10.

Counsel for the Crown argued that even if the appellant had been detained, not all detentions require the provision of all the rights enumerated in s. 10 of the Charter; in this case, the detention does not give rise to a right to counsel since no purpose

would be served by allowing a person who is going to be searched the right to retain and instruct counsel. I do not agree with this submission. If the appellant had been given the right to consult counsel, counsel could have informed her of her right under s. 144 of the *Customs Act* to request higher authorization for the search. It is idle to speculate as to what might have happened. In my view it is not correct to argue that counsel would perform no useful function in this situation.

I am therefore of the view that the appellant was detained when she entered the search room and that she should have been informed of her right to retain and instruct counsel at that time.

VI *Section 8 of the Charter*

The second issue raised in this appeal is the constitutional validity of the former ss. 143 and 144 of the *Customs Act*. It should be noted at the outset that the appellant does not allege that the search to which she was subjected failed to satisfy the terms of ss. 143 and 144 of the *Customs Act*. Her argument is rather that the personal search provisions of the *Customs Act* do not conform to the Charter. Counsel for the appellant argued that these sections infringe the right to be secure against unreasonable search and seizure enshrined in s. 8 of the Charter because they do not conform to the criteria established by this court in *Hunter v. Southam Inc.* The Crown conceded the sections do not meet the *Hunter v. Southam Inc.* standards but contended that these standards are inapplicable to border situations.

In *Hunter v. Southam Inc.*, the court considered the validity of certain sections of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, in the context of s. 8 of the Charter. Under the search provisions of that Act, combines investigation officers could obtain authorization to search any premises on which the Director of Investigation believed evidence relevant to an inquiry under the *Combines Investigation Act* was to be found. This court found the provisions infringed the right to be secure against unreasonable search and seizure. The court recognized that the purpose of s. 8 was to act as a limitation on the pre-existing search powers of government. The Charter does not protect the individual from all searches, but only from those deemed to be unreasonable. The central question in that appeal was how to assess whether the search provisions in the *Combines Investigation Act* were reasonable. This court now faces the same issue with reference to the *Customs Act*.

In *Hunter*, this court established three criteria to which

reasonable searches must conform. First, where possible, the search must have been approved by prior authorization. This ensures that unjustified searches will be prevented before they occur. The court acknowledged that it might not be reasonable in all circumstances to insist on prior authorization but held that where it was feasible, prior authorization was a pre-condition of a reasonable search. Second, the person authorizing the search need not be a judge but must act in a judicial manner. That person must be able to assess in a neutral and impartial fashion whether on the evidence available a search is appropriate. Finally, there must be reasonable and probable gounds, established upon oath, to believe that an offence has been committed and that evidence of this is to be found at a particular place. The court recognized that this standard is subject to change "[w]here the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply [an] expectation of privacy as, for instance, when the search threatens . . . bodily integrity" (p. 115 C.C.C., p. 659 D.L.R., p. 168 S.C.R.).

In this case it is clear that the *Hunter v. Southam Inc.* standards are not met. Sections 143 and 144 do not mandate prior authorization of personal searches by a person acting in a judicial capacity. The standard upon which a search may be conducted under the provisions, reasonable cause to suppose, also falls short of the reasonable and probable grounds established on oath required by *Hunter*. There is no warrant requirement. The question this court must address is whether strip searches of persons seeking to enter this country are reasonable within the meaning of s. 8 of the Charter even if they do not satisfy the criteria established in *Hunter v. Southam Inc.*

The Crown urged this court to accept the submission that customs represents an unusual situation and therefore that the requirements of *Hunter v. Southam Inc.* should not be applied to border searches. The Ontario Court of Appeal accepted this argument. That court held that it was not unreasonable for sovereign nations to restrain temporarily persons entering the country, nor was it unreasonable to search their persons to determine if they were bringing contraband into the country. The British Columbia Court of Appeal also accepted this position in *R. v. Jordan* (1984), 11 C.C.C. (3d) 565, 39 C.R. (3d) 50 (B.C.C.A.). In that case the accused was subjected to a strip search upon his return from Asia based on an informant's tip that he would be transporting illicit drugs. The court rejected the accused's s. 8

challenge to the validity of ss. 143 and 144 holding that the standard of reasonableness is much lower in respect of border searches. It expressly adopted the American approach to the reasonableness of customs searches.

The Nova Scotia Supreme Court reached the opposite result in *R. v. Jagodic and Vajagic* (1985), 19 C.C.C. (3d) 305, 68 N.S.R. (2d) 271, 15 C.R.R. 146 (N.S.S.C.T.D.). That case concerned the constitutionality of s. 133 of the former *Customs Act* which permitted any collector or justice of the peace, upon information, to open and examine any package suspected to contain prohibited property or smuggled goods brought into the country. Acting on information from the United States, customs officers and the R.C.M.P. had searched a car being imported from Germany by Jagodic when it arrived at East Passage, Nova Scotia. Seven bags of cocaine were discovered hidden behind the door panels of the car. MacIntosh J. held that *Hunter v. Southam Inc.* established a minimum standard for all searches consistent with s. 8 of the Charter and accordingly found s. 133 in violation of that section. The judge, however, found the search of the car valid even though it had been conducted without a warrant since it was not feasible to obtain a warrant in the circumstances. Although his conclusion that the rights of the accused were not violated made a discussion of admissibility unnecessary, MacIntosh J. went on to consider the question of admissibility under s. 24(2) of the Charter. He was of the view that admission of the evidence would not bring the administration of justice into disrepute.

The argument that customs searches need not comply with the standard enunciated in *Hunter v. Southam Inc.* has as its basis the proposition that reasonableness depends on the circumstances under which a particular search is conducted and that searches which ordinarily would not be reasonable in other circumstances are reasonable at customs. According to this argument, reasonableness cannot be determined solely by considering the conduct leading up to the search, the performance of the actual search itself, and the degree of intrusion involved in the search. These factors must be assessed in light of the context in which the search is performed for an accurate appraisal of reasonableness.

The Crown finds support for a contextual approach to determining reasonableness under s. 8 of the Charter in *Hunter v. Southam Inc.* In *Hunter*, the court noted that although the common law protections against government searches were rooted in the right to enjoyment of property and were related to the law of trespass, s. 8 was designed to protect a broader interest of

personal privacy. The court noted that the Charter did not, however, grant unqualified protection of individual privacy (at p. 108 C.C.C., pp. 652-3 D.L.R., pp. 159-60 S.C.R.):

> The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether *in a particular situation* the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

(Further emphasis added.) In determining the reasonableness of a search, the Crown argued, it was essential to examine the expectation of privacy that would be reasonable given the peculiarities of the situation in which the search occurred. At customs, a different standard of reasonableness would be warranted for two reasons: persons seeking to enter a country have a lower expectation of privacy than they would in most other situations and, states have an important interest in preventing the entry of undesirable persons and goods which justifies more intrusive procedures, particularly where the goods are prohibited narcotics not indigenous to the country.

It is true that a determination of reasonableness must depend to some degree on the circumstances in which a search is performed. In my view, however, it would be incorrect to place overwhelming emphasis on the surrounding circumstances when assessing reasonableness under s. 8. Regardless of the constraints inherent in the circumstances, the safeguards articulated in *Hunter v. Southam Inc.* should not be lightly rejected. Although *Hunter* did not purport to set down immutable preconditions for validity applicable to all searches, the court arrived at the three minimum prior authorization requirements only after examining the values s. 8 is meant to protect. Foremost among these values is the interest in preventing unjustified searches before they occur. This is a basic value regardless of situational constraints. In light of the importance of preventing unjustified searches, departures from the *Hunter v. Southam Inc.* standards that will be considered reasonable will be exceedingly rare.

The crux of the Crown's argument is that the reasonableness of border searches within the meaning of s. 8 ought to be treated differently from searches occurring in other circumstances. The Crown relied heavily on the rationales articulated in American cases for carving out customs procedures as a general exception to standard search and seizure protections. The dominant theme

uniting these cases is that border searches lacking prior authorization and based on a standard lower than probable cause are justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue. These important state interests, combined with the individual's lowered expectation of privacy at an international border render border searches reasonable under the Fourth Amendment. In my view, the state interests enunciated throughout the American jurisprudence that are deemed to make border searches reasonable, are no different in principle from the state interests which are at stake in a Canadian customs search for illegal narcotics. National self-protection becomes a compelling component in the calculus.

I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

In my view, routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges permitted by the framers of ss. 143 and 144 of the *Customs Act*, are not unreasonable within the meaning of s. 8. Under the *Customs Act* searches of the person are not routine but are performed only after customs officers have formed reasonable grounds for supposing that a person has contraband secreted about his or her body. The decision to search is subject to review at the request of the person to be searched. Though in some senses personal searches may be embarrassing, they are

conducted in private search rooms by officers of the same sex. In these conditions, requiring a person to remove pieces of clothing until such time as the presence or absence of concealed goods can be ascertained is not so highly invasive of an individual's bodily integrity to be considered unreasonable under s. 8 of the Charter.

I also emphasize that, according to the sections in question: (i) before any person can be searched the officer or person so searching must have reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his or her person, and (ii) before any person can be searched, the person may require the officer to take him or her before a police magistrate or justice of the peace or before the collector or chief officer at the port or place who shall, if he or she sees no reasonable cause for search, discharge the person.

In light of the existing problems in controlling illicit narcotics trafficking and the important government interest in enforcing our customs laws, and in light of the lower expectation of privacy one has at any border crossing, I am of the opinion that ss. 143 and 144 of the *Customs Act* are not inconsistent with s. 8 of the Charter.

Although I am of the opinion that ss. 143 and 144 of the *Customs Act* are not unreasonable and therefore do not infringe s. 8 of the Charter, I am not persuaded that the search itself was conducted in a reasonable manner. This point was not argued by counsel and strictly speaking, it is not necessary to address it. I wish, however, to make a few observations on the manner in which the search was conducted.

The personal search provisions of the *Customs Act* are notable in that they provide for a second authorization prior to the performance of a search. The second authorization is not *de rigueur* in all cases, but becomes mandatory upon request by the person to be searched. The *Customs Act* places no onus on the officers to inform persons about to be searched of their right to obtain a second opinion. There is, in fact, no onus on the officers to explain the limits of their authority under the *Customs Act* or with what demands a person detained at the border is required to comply. In the present appeal, the customs officials did not read the text of the personal search provisions to the appellant. The officials simply pointed to a sign on the wall containing the text of ss. 143 and 144. There is no evidence that the appellant read the provisions, much less understood them. There is no indication that the appellant knew of her right to demand a second authorization. What is clear is that the appellant was unsure of the officers'

authority. Although she complied with their demands throughout, at one point during the search she asked whether it was really necessary for her to comply.

It is clear from the foregoing that the right to counsel has an important impact on the execution of the search. Had the appellant been informed of her right to counsel at the point she was detained, and she availed herself of that right, the appellant would have had the benefit of legal advice. Counsel could have dispelled the appellant's uncertainty surrounding the search procedure by explaining the content of ss. 143 and 144 and assuring the appellant of the officers' right to insist she remove her clothing. Counsel could also have ensured that the statutory standard of reasonable cause to suppose had been satisfied and assured the appellant that there were proper grounds to warrant a search. In my view, the denial of the appellant's right to counsel cannot avoid having an impact on the reasonableness of the subsequent search of the appellant.

Although the court has not been asked to decide the point, I am of the view that the denial of the right to counsel in this case in conjunction with the absence of any explanation to the appellant of her rights under the *Customs Act* rendered the search unreasonable. The violation of the right to counsel deprived the appellant of her ability to exercise a legal right provided in the *Customs Act*. A search that might not have been conducted had the appellant had the benefit of legal advice was performed in circumstances in which the appellant was ignorant of her legal position. In my view, the violation of the right to counsel combined with the statutory right of prior authorization rendered the performance of the search unreasonable.

VII *Section 1 of the Charter*

Having earlier found that the appellant's right under s. 10(*b*) of the Charter to retain and instruct counsel was infringed, the next stage would ordinarily be to determine whether this violation may be justified under s. 1. I begin by noting that the Crown made no submissions on the point.

The *Customs Act* contains no express limitation on the right to counsel. There was no argument that a limitation on the right to counsel arises from necessary implication of law. The limit upon the appellant's right to retain and instruct counsel was not a limit imposed by law, but rather by the actions of customs officials. I am therefore of the view that the infringement of the appellant's rights pursuant to s. 10(*b*) of the Charter has not been justified under s. 1.

I am also of the view that the violation of the appellant's s. 8 rights was not justified under s. 1 of the Charter. The violation of s. 8 occurred because the search was executed in an unreasonable manner. Like the violation of the appellant's right to counsel, the infringement of the appellant's right to be secure against unreasonable search and seizure resulted from the actions of customs officials. It was not a limitation imposed by law.

VIII *Section 24(2) of the Charter*

The final question in this appeal is whether the evidence should be excluded under s. 24(2) of the Charter. As Lamer J. noted in *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265 (S.C.C.), the Charter enshrines a position with respect to evidence obtained in violation of Charter rights that falls between two extremes. Section 24(2) rejects the American rule that automatically excludes evidence obtained in violation of the Bill of Rights: see, for example, *Weeks v. U.S.*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961). It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained: see *R. v. Wray*, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272. Evidence may be excluded under s. 24(2) if having regard to all the circumstances, it is established that the admission of it would bring the administration of justice into disrepute. The person seeking to exclude the evidence bears the burden of persuading the court, on a balance of probabilities, that admission of the evidence could bring the administration of justice into disrepute in the eyes of a reasonable person, " 'dispassionate and fully apprised of the circumstances of the case' ": *Collins*, *supra*, at p. 18 C.C.C., p. 524 D.L.R., at p. 282 S.C.R.

In *Collins*, Lamer J. canvassed the factors to be balanced by the court in determining whether introducing the evidence into the proceedings would bring the administration of justice into disrepute. He organized the factors into three groups based on their effect on the repute of the justice system. The first set of factors are those relevant to the fairness of the trial. Evidence that might in some way affect the fairness of the trial would tend to bring the administration of justice into disrepute and in general should be excluded. Within this category, Lamer J. distinguished between the type of evidence obtained (at pp. 19-20 C.C.C., p. 526 D.L.R., pp. 284-5 S.C.R.):

> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was

violated. Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. Our decisions in *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613, and *Clarkson v. The Queen* (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, are illustrative of this. The use of self-incriminating evidence obtained following a denial of the right to counsel will, generally, go to the very fairness of the trial and should generally be excluded.

The second set of factors concerns the seriousness of the Charter violation as defined by the conduct of the law enforcement authorities. In this category, an assessment of whether the breach was committed in good faith, whether it was one of a merely technical nature or whether it was deliberate and flagrant falls to be considered. Also within this category is the consideration of whether the Charter violation was motivated by circumstances of urgency or from fear of destruction of evidence. Finally, if other investigatory techniques had been available or if the evidence could have been obtained in a manner which would not have infringed the Charter, the violation would tend to be construed as more serious.

The third set of factors recognizes the possibility that the administration of justice could be brought into disrepute by excluding evidence despite the fact that it was obtained in a manner that infringed the Charter. The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other. In some cases the harm to the integrity of the judicial system resulting from excluding the evidence will be so great that exclusion and not admission will bring the administration of justice into disrepute. This would be the case if evidence necessary to substantiate a charge were excluded on the basis of a trivial Charter violation.

In this case there were ample "objective, articulable facts" (see *United States v. Guadalupe-Garza*, 421 F. 2d 876 (9th Cir. 1970)), to support the customs officer's suspicion that the appellant was concealing something on her body for the purpose of bringing it into Canada illegally. The appellant was nervous, she had come from a country considered to be an important source of drugs, her

means of identification and the story which accompanied it were suspect, and finally, bulging was obvious in the area of her upper abdomen.

The evidence obtained as a result of the strip search was real evidence that existed irrespective of the Charter violations. As Belzil J.A. observed in *R. v. Dumas* (1985), 23 C.C.C. (3d) 366 at p. 372, 66 A.R. 137, 41 Alta. L.R. (2d) 348 (Alta. C.A.): "What is sought to be excluded here is pre-existing physical evidence which the appellant was attempting to conceal to prevent its detection and rightful seizure . . .". Unlike the situation in *Therens*, *supra*, the accused here was in no way conscripted against herself. The admission of the evidence in this case, in contrast to *Therens*, would therefore not tend to affect adversely the fairness of the trial process. The customs officers acted in good faith based on accepted customs procedures. There was nothing deliberate or blatant in the denial of the appellant's rights. There is nothing to indicate that the customs officers treated the appellant in a discourteous fashion. In fact, the evidence reveals that the officers informed the appellant of her right to counsel as soon as they thought it was necessary to do so and gave her the opportunity to exercise that right. This court held in *Sieben v. The Queen* (1987), 32 C.C.C. (3d) 574, 38 D.L.R. (4th) 427, [1987] 1 S.C.R. 295 (S.C.C.), and *Hamill v. The Queen* (1987), 33 C.C.C (3d) 110, 38 D.L.R. (4th) 611, [1987] 1 S.C.R. 301 (S.C.C.), that constitutional invalidity of a search power does not render evidence inadmissible if the officers conducting the search have relied in good faith on the constitutionality of the provision. In this instance the customs officials were acting in accordance with existing statutory requirements. The breaches occurred not long after the Charter came into force and several years before the decision of this court in *Therens* on the meaning of detention in s. 10(*b*). At the time of this search the decision of this court in *Chromiak*, *supra*, stood for the proposition that investigative detentions of this sort were not detentions of the type requiring persons to be advised of their right to counsel.

Although the breach of the appellant's s. 10(*b*) and s. 8 rights were not strictly speaking trivial, in my opinion, for the reasons given, this is the kind of case where the evidence should be admitted. Exclusion of the evidence would tend to bring the administration of justice into disrepute.

I would emphasize as well that all five judges of the Ontario Court of Appeal, including Mr. Justice Tarnopolsky, were of the view that the admission of the evidence in question would not bring the administration of justice into disrepute.

In my view, the trial judge erred in excluding the evidence under s. 24(2). I would therefore dismiss the appeal and send the case back for a new trial. I would answer the constitutional questions in the following manner:

Question 1: Is a person who is required by a customs officer upon entering Canada to submit to a search of his or her person for contraband which is suspected of being secreted about his or her person, such search being pursuant to ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, detained within the meaning of s. 10 of the *Canadian Charter of Rights and Freedoms*, thereby requiring that such person be informed of the right to retain and instruct counsel without delay?

Answer: Yes.

Question 2: Are ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, inconsistent with a person's right to be secure against unreasonable search and seizure as guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*, and thereby of no force and effect to the extent of that inconsistency?

Answer: No.

Question 3: If a failure to inform a person who is searched pursuant to ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, of his or her right to retain and instruct counsel without delay is in violation of s. 10 of the *Canadian Charter of Rights and Freedoms*, is such a violation justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 4: If ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, are found to be inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms*, are these sections justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Question 4 does not require an answer.

BEETZ and LAMER JJ. concur with DICKSON C.J.C.

MCINTYRE J. concurs with L'HEUREUX-DUBE J.

WILSON J.:—I have had the benefit of the reasons of both the Chief Justice and Madam Justice L'Heureux-Dubé and I am in agreement with the result reached by the Chief Justice and with some of his reasons.

I agree with the Chief Justice that the appellant was "detained" within the meaning of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* when she was forced to submit to a strip search and that she should have been informed of her right to retain and instruct counsel at that time. I also agree with the Chief Justice that ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, are not inconsistent with s. 8 of the Charter. I agree with him also

that the admission of the evidence of the drugs found on the person of the appellant as a result of the strip search would not "bring the administration of justice into disrepute" within the meaning of s. 24(2).

I prefer, however, to give my own reasons on the reasonableness of the strip search under s. 8.

The constitutionality of the strip search of the appellant cannot, in my view, be determined solely on the basis of whether there has been compliance with the statutory search provisions of ss. 143 and 144 of the *Customs Act*. These statutory provisions must be read in conjunction with the obligation under s. 10(*b*) of the Charter to inform those who are detained of their right to retain and instruct counsel without delay and to respect that right. I say that because in *R. v. Therens* (1985), 18 C.C.C. (3d) 481 at p. 488, 18 D.L.R. (4th) 655 at p. 662, [1985] 1 S.C.R. 613 at p. 621 (S.C.C.), this court stated that any limit on the constitutionally guaranteed right to counsel, if it is to be valid under s. 1 of the Charter, has to be "prescribed by law". Le Dain J. went on to explain what this meant at p. 506 C.C.C., p. 680 D.L.R., p. 645 S.C.R.:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.

In *Thomsen v. The Queen* (1988), 40 C.C.C. (3d) 411, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1 (S.C.C.), the court, speaking through Le Dain J., unanimously adopted his view at p. 419 C.C.C., p. 651 S.C.R.:

> I remain of the view that a limit prescribed by law within the meaning of s. 1 may result by implication from the terms of a legislative provision or its operating requirements. It need not be an explicit limitation of a particular right or freedom.

There is no such limit on the appellant's s. 10(*b*) rights, either expressed in ss. 143 and 144 of the *Customs Act* or necessarily implied from the terms of these sections or from their operating requirements. There is nothing in these sections which is incompatible with the right to counsel, nor do their operating requirements preclude such right. Section 143 of the *Customs Act* permits a search when the customs officer

> 143. . . . has reasonable cause to suppose that the person searched has . . . prohibited goods, secreted about his person.

Section 144 provides:

> 144(1) Before any person can be searched, the person may require the officer to take him before a police magistrate or justice of the peace, or before the collector or chief officer at the port or place, who shall, if he sees no reasonable cause for search, discharge the person . . . .

These statutory provisions do not purport to impose a limit or attempt to preclude resort to the right to counsel and are completely compatible with the appellant's s. 10(*b*) rights. Yet the appellant was not afforded the opportunity to contact her counsel before she was strip-searched.

As the Chief Justice points out, the appellant was detained during the strip search in the sense that she was not free to leave and was subject to external restraint and control throughout the strip search. The appellant was denied her right to retain and instruct counsel without delay and her right to be informed of that right. Only after the search disclosed the presence of drugs on her person and she was arrested for importing narcotics was she informed of her right to counsel and did in fact telephone counsel.

In my view, the violation of the appellant's s. 10(*b*) rights prior to the search renders the search unconstitutional given the complete compatibility of the authorizing statutory search provisions with the right to retain and instruct counsel without delay which is guaranteed in the Constitution. An unconstitutional search cannot be a reasonable one.

Although the unconstitutionality of the search renders the search *per se* unreasonable, I would add that the *manner* in which the search was conducted in this case was also unreasonable in light of the values and purposes protected by s. 8 of the Charter. It is, in my view, unreasonable for a detained person to be simply directed to a sign on the wall of a search room setting out the legal provisions which authorize the search of his or her person. It is hardly surprising on the facts of this case that there is no indication that the appellant even read the provisions of ss. 143 and 144 of the *Customs Act* posted on the wall, let alone exercised the legal options and rights conferred in those provisions. A person who is detained and about to be searched can hardly be expected to be his or her own lawyer. Recourse to legal assistance in such circumstances will often be essential in order to ensure that citizens are protected from unreasonable searches and seizures: see *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 at p. 109, 11 D.L.R. (4th) 641 at p. 653, [1984] 2 S.C.R. 145 at p. 160 (S.C.C.). If the appellant had been informed of her right to consult counsel, counsel could have explained to her the right under s. 144 of the *Customs Act* to request higher authorization for the search

and advised her as to whether or not she should exercise it. This would have furthered the purpose of s. 8 in preventing unreasonable searches. As the circumstances of this case show, the right to counsel could be highly useful in facilitating the effective and fair operation of the statutory search provisions, in particular, the higher authorization procedure provided for in s. 144. In this case the appellant's right to counsel was not respected and, not surprisingly, her rights under s. 144 were not exercised.

This court has recognized that the values protected by s. 8 are not limited to those of privacy: see *Hunter v. Southam Inc.*, at p. 108 C.C.C., p. 652 D.L.R., p. 159 S.C.R. This case points up some of the additional values that are at stake in protecting people from unreasonable searches and seizures. During the actual strip search the appellant attempted to put forth a protest as to whether the removal of the bandages was "really necessary" before she complied. The concern in s. 8 about preventing unreasonable searches and seizures is tied to a broader concern reflected in many of the legal rights in the Charter to prevent the citizen from being overborne by the much greater power of the state. The availability of legal assistance is crucial in preventing this from happening. It is instructive to note in this case that after the strip search was completed, the drugs discovered and the appellant arrested for importing narcotics, she immediately contacted counsel when informed of her right to do so. Her earlier protests at the strip search suggest that she might well have exercised that right before or during the search had she been advised of it at that time.

I add as a final comment that in advancing the commendable purpose of rendering *all* citizens secure from unreasonable searches and seizures courts should not be unduly influenced by hindsight, *i.e.*, by the fact that many of the searches and seizures which come before us have in fact resulted in the discovery of evidence of criminal activity. The level of protection afforded to the citizen under s. 8 of the Charter must be geared to the innocent as well as to the guilty.

LA FOREST J. concurs with DICKSON C.J.C.

L'HEUREUX-DUBE J.:—I have had the opportunity of reading the reasons of the Chief Justice, and with respect I cannot agree with his disposition of the first question in this appeal.

The first constitutional question is set out as follows:

> 1. Is a person who is required by a customs officer upon entering Canada to submit to a search of his or her person for contraband which is suspected of

being secreted about his or her person, such search being pursuant to ss. 143 and 144 of the *Customs Act*, R.S.C. 1970, c. C-40, detained within the meaning of s. 10 of the *Canadian Charter of Rights and Freedoms*, thereby requiring that such person be informed of the right to retain and instruct counsel without delay?

In my opinion, the answer to this question must be in the negative.

The Chief Justice approached the issues in this case by distinguishing between three types of border searches. He found that the facts of this case fell within the second type [*ante*, p. 689]:

> The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority.

The Chief Justice limited his remarks to this second category. He found that detention under these circumstances constituted detention within the meaning of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. I must state from the outset that I have serious reservations about the use of these categories to divide the issue. However, for the present purposes, I will limit my remarks to the second category as described by the Chief Justice.

I cannot agree with the Chief Justice as to the applicability of s. 10(*b*) in this case. Detention, for the purposes of s. 10(*b*), is defined by Le Dain J. of this court in *R. v. Therens* (1985), 18 C.C.C. (3d) 481 at pp. 503-4, 18 D.L.R. (4th) 655 at p. 678, [1985] 1 S.C.R. 613 at pp. 641-2 (S.C.C.):

> The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 — arrest and detention — are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s. 10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

With respect for the contrary opinion, I cannot accept the contention that this definition goes so far as to cover a search by a customs officer who carries out the routine procedures included in

the Chief Justice's second category in order to prevent the illegal importation of goods and substances into Canada.

In considering the question of detention, a distinction must be made between a search which occurs within Canada, and one which occurs when an individual attempts to gain admission to this country. Persons entering Canada, whether they be citizens or not, are placed in a unique legal situation at the point at which they enter the country.

As noted by Howland C.J.O., individuals arriving at the border are subject to a form of restraint from the outset, in that they will be denied entry to the country until the immigration and customs officials are satisfied that they have a right to enter and that the goods and substances which they have in their possession are such as can be legally brought into Canada. The most common form of this restraint is the "routine questioning" which falls into the Chief Justice's first category. In the opinion of the Chief Justice, no Charter issues are raised in these circumstances. Where I would differ with the Chief Justice is in drawing the line after this first category. A more detailed search of the person of the individual entering the country is a standard and necessary part of border inspection procedures whenever there is, as stipulated in s. 143 of the *Customs Act*, R.S.C. 1970, c. C-40, a "reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his person". In the words of Howland C.J.O. (1984), 11 C.C.C. (3d) 193 at p. 214, 7 D.L.R. (4th) 719 at pp. 740-1, 45 O.R. (2d) 609:

> If a person reasonably arouses suspicion by giving the appearance of concealing something on his or her person, then he or she must expect to be asked to remove sufficient clothing to confirm or dispel this suspicion.

The person required to undergo a strip search in these circumstances is not detained within the meaning of s. 10(*b*) of the Charter.

The true meaning of detention must come from the Charter and its purpose and intent. In my view, the *Therens* definition would be overly broad if it was intended to cover situations at the border. The right to counsel is primarily aimed at preventing the accused or detained person from incriminating herself. Thus the main concern would be with coerced or uninformed confessions. In such circumstances, the accused would be manufacturing the evidence against herself. This is something which, in the interests of fairness, the right to counsel would seek to protect. However, a customs search occurs under circumstances where the person being searched is not in a position where she could manufacture

evidence. She is not being interrogated; she is merely being searched, just as one is searched before boarding a commercial airplane on a Canadian airline. The "right to counsel" has less meaning in these circumstances. A further purpose of the right to counsel is illustrated by the *Therens* case. There, the detained person had two choices. He could submit to the test and manufacture evidence against himself, or he could refuse the test and be subject to criminal sanctions for his refusal. In such circumstances, the presence of counsel would have been necessary to inform him of his rights under each alternative, and to advise him of the best option. Again, this type of situation does not arise in a border search, although the person being searched does have a right to "appeal" the search to a higher customs authority, as provided in ss. 143 and 144 of the *Customs Act*, of which the appellant was made aware.

The purpose of the right to counsel is discussed by Peter Michalyshyn in his article "The Charter Right to Counsel: Beyond *Miranda*", 25 Alta. L. Rev. 190 (1987). He quotes from the judgment of Justice Wilson in *Clarkson v. The Queen* (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383 (S.C.C.), at p. 191 of his article:

> In *Clarkson v. The Queen* Wilson J. stated that "This right, as entrenched in s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*, is clearly aimed at fostering the principles of adjudicative fairness," and later, ". . . the purpose of the right, as indicated by each of the members of the court in *Therens*, *supra*, is to ensure that the accused is treated fairly in the criminal process."

A border search is not part of the criminal process, but rather part of the process of entering into the country. The searched person's right to counsel would arise if and when she was placed under custody as part of the criminal process.

Michalyshyn also compares the 10(*b*) right with the similar American right (at p. 191):

> [I]n the United States the right to counsel ensures that the individual facing custodial interrogation (in Canada we would substitute "arrest or detention") is informed of his rights so as to make a "free and rational choice whether to incriminate himself." In short, the right to counsel ensures, in certain well-defined circumstances, the individual's right against self-incrimination.

Using this sort of analysis, it is possible to distinguish the two types of situations. In a border search, the issue is not one of self-incrimination. The individual is not facing "custodial interrogation". In my view, the right to counsel was chiefly intended for that type of situation.

Therefore, given the *purpose* of the right to counsel, s. 10(*b*) clearly does not apply to a border search. The person required to

undergo a strip search in these circumstances is not detained within the meaning of s. 10(*b*) of the Charter.

I do not suggest, however, that no right to counsel can ever arise in searches which occur at ports of entry. Where the purpose of the detention, interrogation, or search arises in criminal proceedings, as distinct from those concerning entry into the country, the Charter protection against unreasonable search and seizure and the right to counsel will apply. Individuals arriving at customs, however, in electing to travel outside the country or in seeking entry for the first time, have implicitly chosen to submit to the rules and procedures for leaving and entering the country. They expect, and are expected, to submit to a certain degree of inspection of their baggage, and in some cases, their person. Their situation is distinguishable from one where an individual is stopped or detained in the course of his or her normal activities within Canadian territory. It is incidents of this latter nature to which, in my view, the definition in *Therens* was meant to apply.

The same issue has arisen in the United States under the American Constitution. The Chief Justice has canvassed the American jurisprudence on this point and I see no necessity to go through it again at length. I intend merely to highlight certain elements of the American case-law.

The Fourth Amendment protection against unreasonable search and seizure has been held in the United States not to extend to border searches. The United States Supreme Court justified this exception on the basis of national interest and the unique situation. In the words of Justice Rehnquist in *U.S. v. Ramsey*, 431 U.S. 606 (1977), at p. 619:

> Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside.

On the question of national interest, the U.S. Supreme Court in *Carroll v. U.S.*, 267 U.S. 132 (1925), stated at pp. 153-4:

> Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

These considerations are crucial in drawing a distinction between stopping a person at the border and detaining someone within the country. They are also significant in underlining the valid national interests behind any distinction. Customs officials at border crossings are, in most cases, the last possible check on the importation of harmful and illicit substances into the country.

There is no question that the importation of drugs into this country from abroad contributes significantly to a problem which is of serious national concern. The scope of this problem, in the context of the border situation, is highlighted by Howland C.J.O., *supra*, at p. 199 C.C.C., p. 725 D.L.R.:

> By agreement of counsel, evidence was furnished by Superintendent Wilson that between April 1, 1982 and March 31, 1983, there were 442 drug seizures at the Toronto International Airport, of which 80% were *cannabis* seizures from Jamaica flights.

It is my view that the same circumstances and conditions which have moved the American courts to exempt border searches from the Fourth Amendment protection are operative here. I would agree with the majority that ss. 143 and 144 of the *Customs Act* are not unreasonable and therefore do not infringe s. 8 of the *Canadian Charter of Rights and Freedoms*. In my view, the appellant was sufficiently informed of her right to appeal the search to a higher customs authority when she was shown the text of ss. 143 and 144. Because of this and because I find that the accused was not detained within the meaning of s. 10(*b*) of the Charter, I cannot agree with the majority's position that the search was conducted in an unreasonable manner.

Thus, while I concur in the result reached by the majority of the court, for the reasons above, I respectfully disagree with the finding that the appellant was detained within the meaning of s. 10(*b*) of the Charter.

Consequently, I would answer the constitutional questions as follows:

Question 1: No.

Question 2: No.

Questions 3 and 4: Do not require an answer.

Appeal dismissed.

Re New Brunswick Telephone Co. Ltd. and Kenny et al.

[Indexed as: New Brunswick Telephone Co. v. Kenny]

New Brunswick Court of Appeal, Stratton C.J.N.B., Hoyt and Ayles JJ.A. December 7, 1988.

Administrative law — Boards and tribunals — Authority — Public Utilities Commission ordering hearing — Considering rates of return for telephone company — Setting tariff — Broad investigative powers — Ordering production of documents — Committee entitled to determine what materials it needs — Public Utilities Act, R.S.N.B. 1973, c. P-27, ss. 2(1), 5(1).

Judge's direction that "if there is no intent to cause death or injury, there is no offence at all".

What the learned Judge said in answer to the question of the jury had, in my view, the effect of preventing the jury from concluding that manslaughter had been committed in so far as this conclusion was based on the theory that the accused caused the death of her husband by an unlawful act, *i.e.*, assault, unless it was proved that the accused intended to cause death or injury.

If the jury was improperly instructed on the law relating to culpable homicide and manslaughter it follows that there would be no proper basis for a correct verdict on murder.

A few sentences later in his supplementary charge the learned Judge went on to say: ". . . but if there is no intent to do something wrong there is no offence . . .".

In my view, this latter remark does nothing to remedy the original error committed when the learned Judge said "if *there is no intent to cause death or injury there is no offence at all*".

In *R. v. George (1960), 128 C.C.C. 289 at p. 306, [1960]* S.C.R. 871, 34 C.R. 1, Ritchie, J., made it clear that the word *"intentionally" appearing in the definition of common assault* "is exclusively referable to the physical act of applying force to the person of another".

In my view, the appeal should be allowed and a new trial directed.

TAGGART, J.A.:—I have read the reasons for judgment of my brother Maclean and agree that this appeal should be allowed, the verdict of acquittal set aside and a new trial directed for the reasons given by him.

Appeal allowed.

RE WINKLER AND DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

County Court, Judicial District of York, Ontario, Phelan, Co.Ct.J. November 20, 1973.

Customs and excise — Importation of immoral or indecent books — Books containing disproportionate number of irrelevant photographs graphically portraying lurid sex — Ban on importation upheld — Books considered as a whole offending contemporary standard of Canadian morality — Nature of photographs outweighing any merit in text — Customs Tariff, R.S.C. 1970, c. C-41, s. 14 — Schedule C, tariff item No. 99201-1.

[*Re North American News and Deputy Minister of National Revenue for Customs and Excise* (1973), 14 C.C.C. (2d) 63, 41 D.L.R. (3d) 241, 1 O.R. (2d) 200, apld; *Dominion News & Gifts (1962) Ltd. v. The Queen*, [1964] 3 C.C.C. 1, [1964] S.C.R. 251, 42 C.R. 209, 47 W.W.R. App. II; revg [1963] 2 C.C.C. 103, 40 C.R. 109, 42 W.W.R. 65, consd; *R. v. C. Coles Co. Ltd.*, [1965] 2 C.C.C. 304, 49 D.L.R. (2d) 34, [1965] 1 O.R. 557, 44 C.R. 219; *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585, 12 *Crim. L.Q.* 462; *R. v. Cameron*, [1966] 4 C.C.C. 273, 58 D.L.R. (2d) 486, [1966] 2 O.R. 777, refd to]

Customs and excise — Importation of immoral or indecent books — **Importation for accused's own possession — Irrelevant that mere possession of obscene matter not offence under Criminal Code — Cr. Code, s. 159 — Customs Tariff, R.S.C. 1970, c. C-41, s. 14 — Schedule C, tariff item No. 99201-1.**

Civil rights — Due process — **Equality before the law — Prohibition against importation of immoral or indecent books — Ban and procedure provided not violative of accused's rights — Canadian Bill of Rights, s. 1(a), (b) — Customs Tariff, R.S.C. 1970, c. C-41, s. 14 — Schedule C, tariff item No. 99201-1.**

[*Roth v. United States*, 354 U.S. 476; *Re North American News and Deputy Minister of National Revenue for Customs and Excise* (1973), 14 C.C.C. (2d) 63; 41 D.L.R. (3d) 241, 1 O.R. (2d) 200, refd to]

APPEAL by the accused from the decision of the Deputy Minister of National Revenue prohibiting the importation of books under tariff item No. 99201-1 of sch. C of the *Customs Tariff* (Can.).

V. S. Paisley, for accused, appellant.

H. Erlichman, for respondent, Deputy Minister of National Revenue for Customs and Excise.

PHELAN, CO.CT.J.:—This appeal is taken by Murray Winkler from the decision of the Deputy Minister of National Revenue, which decision upheld a ruling of a Canadian customs appraiser. The appraiser ruled that the importation of two books entitled "Oral Sex and the Law", and "Decision in Denmark", sent to Winkler by the Evergreen Club in New York City was prohibited under tariff item No. 99201-1 of sch. C of the *Customs Tariff*, R.S.C. 1970, c. C-41.

Section 14 of the *Customs Tariff* provides:

> 14. The importation into Canada of any goods enumerated, described or referred to in Schedule C is prohibited; and any such goods imported shall thereby become forfeited to the Crown and shall be destroyed or otherwise dealt with as the Minister directs; and any person importing any such prohibited goods, or causing or permitting them to be imported, shall for each offence incur a penalty not exceeding two hundred dollars.

Tariff item No. 99201-C is as follows:

> Books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character.

Winkler's appeal to this Court is taken pursuant to the *Customs Tariff* upon the grounds that:

(1) The books in question are chiefly of a discursive character dealing mainly with the processes by which the obscenity laws in Denmark were changed.

(2) The books are not of an immoral or indecent character.

(3) They conform to contemporary community standards of tolerance in respect of pornographic literature.

(4) Since it is not unlawful to own or possess these books in Canada they cannot be immoral or indecent.

(5) The Minister's action violates the *Canadian Bill of Rights*.

Both books contain approximately 275 pages. "Oral Sex" contains 190 "illustrations", 28 of which are in full colour and the balance in black and white. "Decision in Denmark" contains 175 "illustrations", 25 of which are in colour and the balance in black and white. By far the larger portion of the "illustrations" in both books are full-page photographs.

There was filed as an exhibit an illustrated announcement to Evergreen Club members respecting "Oral Sex" which reads in part as follows:

> Extensive selections describing oral sex from little-known, as well as famous, works of literature from many countries... 190 illustrations in black and white and full colour art, photographs from Danish and underground publications and private collections, stills from underground and stag films...
>
> (note: all photos in the book are completely uncovered).

The announcement would apply equally well to "Decision in Denmark". This book contains a foreword by one William Edward Sprague, author of "Sex, Pornography and The Law", in which he states:

> In its pages will be found, in painstaking detail, the arduous journey travelled by the leaders of the small nation (Denmark), the anguish suffered by them, and the collective soul-searching that brought them to their brave conclusions and fostered their historically unique "experiment". Within its pages will be found clear-cut pictorial examples of the objects of their anguishing and the products of their decision — without which examples, let us immediately note, the record of their noble journey would be so many words shouted, as it were, into the winds of suppression.

Mr. G. P. Trotman, the Director of the Legal Branch of the Department of National Revenue, very fairly admitted that no

objection was taken with respect to the text of either book. The position of the Minister is that both books, solely because of their pictorial illustrations, were considered to be of an immoral or indecent character.

In approaching the issue as to whether these books are of an immoral or indecent character it is necessary to consider them individually, as a complete work, to determine whether they offend the contemporary standard of Canadian decency or morality.

In considering the books individually, as a complete work, one is driven to ask, are these photographs, the "clear-cut pictorial examples of the objects of their [Danes'] anguishing", necessary for a full understanding and appreciation of "Decision in Denmark"? Are the photographs from "underground publications and private collections, stills from underground and stag films" necessary to a full understanding and appreciation of the book "Oral Sex"?

Counsel for Winkler concedes that there is no relationship between the text in either book and the pictorial illustrations. There is indeed no reference in the text in either book to the illustrations. They appear to have been inserted into the books indiscriminately. Both books contain a "list of illustrations". The list makes it clear in each case that the photographs were taken from underground erotic publications, private collections, adult magazines, stag and underground films, girly magazines, sex-oriented publications and Danish publications. They include heterosexual and homosexual views detailing the sexual activities of men and women, including scenes involving three or more persons, all of which scenes are completely uninhibited and unrestrained in their graphic portrayal of sex in its most lurid form.

Serious or not as the text may be, do the books with a disproportionate stress on the illustrations, all of which are completely imbued with sex, conform to the contemporary standard of Canadian decency or morality?

Mr. Justice Freedman of the Manitoba Court of Appeal in his dissenting judgment, [1963] 2 C.C.C. 103, 40 C.R. 109, 42 W.W.R. 65, which was followed in the Supreme Court of Canada in *Dominion News & Gifts (1962) Ltd. v. The Queen*, [1964] 3 C.C.C. 1, [1964] S.C.R. 251, 42 C.R. 209, discussed "community standard" in his consideration of a charge of obscenity under the *Criminal Code* against the publisher of two magazines. He used these words [at pp. 116-7]:

> Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or

puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the efforts must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilictions of the particular Judge who happens to be trying the case.

Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question of whether Dude and Escapade [the magazines being considered] are obscene according to our criminal law.

In *R. v. C. Coles Co. Ltd.*, [1965] 2 C.C.C. 304 at p. 317, 49 D.L.R. (2d) 34, [1965] 1 O.R. 557, Roach, J.A., in discussing Canadian community standards said: "... how would a reasonable cross-section of the general public regard it, not the prude or the puritanical, not the libertine, but the average, well-intentioned, moderate individual"?

In 1970, Mr. Justice Freedman again had occasion to deal with the problem of community standards in *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 at p. 255, 75 W.W.R. 585, 12 *Crim. L.Q.* 462:

An indication of community thinking in this area is furnished by Parliament's amendment in 1969 ... of s. 149 of the *Criminal Code* dealing with gross indecency. It exempted from the scope of that section any act committed in private between husband and wife or between consenting adults. So whatever went on between husband and wife in their bedroom was nobody's business but their own. So too, with consenting adults, be they one male and one female, or two males or two females. But — and this is of special significance in the present context — the amendment went on to state that:

"149A(2)(*a*): an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present ..."

Community thinking was not prepared to sanction an act so committed.

In *Re North American News and Deputy Minister of National Revenue for Customs and Excise*, July 17, 1973 (unreported [since reported 14 C.C.C. (2d) 63, 41 D.L.R. (3d) 241, 1 O.R. (2d) 200]), Judge Grossberg of the County Court of the Judicial District of York, in considering six publications

which were prohibited entry into Canada under s. 14 of the *Customs Tariff* stated as follows [at p. 66]:

> The words "indecent" or "immoral" are to be understood in their common meaning. "Indecent" means indecent, and "immoral" means immoral.
>
> I find all the publications are indecent or immoral. If I had to, I would find that all the publications are obscene. Each is morally offensive, grossly vulgar and lewd. Each is disgusting and salacious and pornographic. Each has no artistic, literary, scientific, scholarly, or social merit or purpose. Each taken as a whole can only appeal to prurient interest in nudity and in sex. Each is crass, commercial exploitation of artless nudity.

These words apply with equal cogency to both books under consideration in this action taken as a whole. There may be some artistic or literary or scholarly merit in the text themselves, but any such merit is so completely outweighed and overshadowed by the multiplicity of pornographic illustrations that the books in their totality are unquestionably indecent, immoral and obscene.

Granted that there is an even greater tolerance to pornography in the Canadian community since 1970 it would be difficult to conjure up publications which more aptly fit the description of immoral, indecent and obscene than the books under consideration. I cannot conceive that the Canadian standard of acceptance as I appreciate it to be today would even approach toleration of them. I adopt the words of Aylesworth, J.A., when commenting on seven erotic drawings by contemporary artists: "They lie not in any grey area of doubt; they are of base purpose and their obscenity is flagrant": *R. v. Cameron*, [1966] 4 C.C.C. 273, at p. 285, 58 D.L.R. (2d) 486, [1966] 2 O.R. 777.

The appellant contends that since it is not contrary to the law of Canada to own or possess these books they cannot be immoral or indecent, that what is obscene today must be viewed strictly in the context of criminality. The books were purchased by the appellant for his own personal library and not for the purpose of resale. This argument appeals to me as being specious in the extreme. The Dominion Parliament by s. 159 of the *Criminal Code* has made it an offence to publish or distribute any obscene matter, a dominant characteristic of which is the undue exploitation of sex. Parliament by the *Customs Tariff* and Regulations passed thereunder has prohibited the importation into Canada of any books or photographs of immoral or indecent character. As I comprehend the argument of counsel for the appellant, should books or photographs slip through the Customs Department undetected

and reach the safe custody of the appellant's library, the character of the books is thereby changed so that they are no longer immoral or indecent, the inadvertence of the customs official has changed the weeds into roses. These books, whether in the library of the appellant or elsewhere in Canada were immoral and indecent, and while Winkler may very well have been beyond the scope of criminality had they reached his library, their character never changed and the respondent was justified in prohibiting their importation to this country.

The appellant further contends that the action of the respondent in prohibiting the importation of the books violates the *Canadian Bill of Rights* and in particular s. 1(*a*) — the right of the individual to enjoyment of property and the right not to be deprived thereof except by due process of law, and of s. 1(*b*) — the right of the individual to equality before the law and the protection of the law.

The position of the appellant is that s. 14 of the *Customs Tariff* deprives an individual of equal rights before the law since an individual who has possession of the books cannot be charged with a crime. In *Roth v. United States*, 354 U.S. 476 at p. 495, Chief Justice Warren pointed out that, in that action: "It is not the book that is on trial; it is the person." The reverse situation applies in the present action — it is the books which are on trial, not the person. Accordingly, I see no deprivation of Winkler's rights before the law or any conflict between s. 1 of the *Canadian Bill of Rights* and s. 14 of the *Customs Tariff*. I quote further from the judgment of Judge Grossberg in *North American News and Deputy Minister of National Revenue* decision, *supra* [at p. 68]:

> The *Customs Act* provides a code for administration of matters relating to customs and for a review. Parliament is entitled to intervene in the public interest against a trafficker who attempts to dump into Canada for crass commercial gain the publications in question.

The appeal is accordingly dismissed and the decision of the Deputy Minister in classifying the books as prohibition goods under item No. 99201-1 is affirmed.

Appeal dismissed.

21996

Supreme Court of Canada | Cour suprême du Canada

RECEIVED
APR 2 1992
DEPARTMENT OF JUSTICE
LIBRARY, TORONTO

DARLENE MORIN

v.

HER MAJESTY THE QUEEN

- and -

THE ATTORNEY GENERAL OF CANADA

DARLENE MORIN

c.

SA MAJESTÉ LA REINE

- et -

LE PROCUREUR GÉNÉRAL DU CANADA

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Madame Justice McLachlin
The Hon. Mr. Justice Stevenson
The Hon. Mr. Justice Iacobucci

CORAM:
Le très hon. Antonio Lamer, c.p.
L'honorable juge La Forest
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge McLachlin
L'honorable juge Stevenson
L'honorable juge Iacobucci

Appeal heard:
October 1, 1991

Appel entendu:
le 1er octobre 1991

Judgment rendered:
March 26, 1992

Jugement rendu:
le 26 mars 1992

Reasons for judgment by:
The Hon. Mr. Justice Sopinka

Motifs de jugement par:
L'honorable juge Sopinka

Concurred in by:

The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Stevenson
The Hon. Mr. Justice Iacobucci

Souscrivent à l'avis de l'honorable juge Sopinka:
L'honorable juge La Forest
L'honorable juge Stevenson
L'honorable juge Iacobucci

Concurring reasons by:
The Hon. Mr. Justice Gonthier

Motifs au même effet par:
L'honorable juge Gonthier

Concurring reasons by:
The Hon. Madame Justice McLachlin

Motifs au même effet par:
L'honorable juge McLachlin

Dissenting reasons by:
The Rt. Hon. Antonio Lamer, P.C.

Counsel at hearing:

For the Appellant:
Alan J. Risen
Robert B. Kimball

For the Respondent:
Murray D. Segal
Kenneth L. Campbell

For The Attorney General of Canada:
S. R. Fainstein, Q.C.
R. J. Frater

Motifs de dissidence par:
Le très hon. Antonio Lamer, c.p.

Avocats à l'audience:

Pour l'appelante:
Alan J. Risen
Robert B. Kimball

Pour l'intimée:
Murray D. Segal
Kenneth L. Campbell

Pour le procureur général du Canada:
S. R. Fainstein, c.r.
R. J. Frater

Citation	Référence
Ont. Prov. Ct.: Dodds Prov. Ct. J., March 28, 1989.	C. prov. Ont.: j. Dodds, 28 mars 1989.
Ont. Dist. Ct.: Murphy Dist. Ct. J., July 25, 1989.	C. dist. Ont.: j. Murphy, 25 juillet 1989.
Ont. C.A.: (1990), 76 C.R. (3d) 37, 55 C.C.C. (3d) 209, 38 O.A.C. 298.	C.A. Ont.: (1990), 76 C.R. (3d) 37, 55 C.C.C. (3d) 209, 38 O.A.C. 298.

Darlene Morin *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada *Intervener*

Indexed as: R. *v.* Morin

File No.: 21996.

1991: October 1; 1992: March 26.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Trial within a reasonable time -- Delay of 14-1/2 months between accused's arrest and trial -- Delay caused solely by limits on institutional resources -- Whether right to be tried within reasonable time infringed -- Canadian Charter of Rights and Freedoms, s. 11(b).

On January 9, 1988 the accused was charged with impaired driving and with operating a motor vehicle while having a blood alcohol level which exceeded the legal limit. She was released from custody that same day on a promise to appear. When she appeared in Provincial Court on February 23, her counsel explicitly requested "the earliest possible trial date". The trial was set for March 28, 1989. In response to a query from counsel as to whether this was "the earliest date", the presiding justice answered a simple "yes". On her scheduled trial date the accused brought a motion to stay the proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, arguing that the 14-1/2-month delay in bringing her to trial infringed her right to be tried within a reasonable time under s. 11(*b*) of the *Charter*. The motion was dismissed and the accused was convicted on the "over 80" charge. A stay was entered with respect to the impaired driving charge for unrelated reasons. On appeal, the summary conviction appeal court also stayed the "over 80" charge on the basis that the accused had not been tried within a reasonable time. The Court of Appeal allowed the Crown's appeal and restored the conviction.

Held (Lamer C.J. dissenting): The appeal should be dismissed.

Per La Forest, Sopinka, Stevenson and Iacobucci JJ.: The primary purpose of s. 11(*b*) is the protection of the individual rights of accused persons: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to security of the person is protected by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and

restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

A secondary interest of society as a whole has also been recognized by this Court. This interest is most obvious when it parallels that of the accused: society as a whole has an interest in seeing that citizens who are accused of crimes are treated humanely and fairly. There is, as well, a societal interest that is by its very nature adverse to the interests of the accused: there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law.

The general approach to a determination of whether the s. 11(*b*) right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which inevitably lead to delay. The factors to be considered are: (1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the Crown, (d) limits on institutional resources and (e) other reasons for delay; and (4) prejudice to the accused. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial.

An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the *Charter*. While the applicant has the legal burden of establishing a *Charter* violation, an evidentiary burden of putting forth

evidence or argument on particular factors will shift depending on the circumstances of each case. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. An inquiry into unreasonable delay should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. A shorter period of delay will raise the issue if the applicant shows prejudice, as for example if the accused was in custody. If by agreement or conduct the accused has waived any part of this time period, the length of the period of delay will be reduced accordingly.

All offences have certain inherent time requirements which inevitably lead to delay. As well as the complexity of a case, all cases are subject to certain intake requirements and some cases must pass through a preliminary inquiry before reaching trial. The court will also need to consider whether the actions of either the accused or the Crown have led to delay. These latter two factors do not assign "blame" but simply provide a convenient mechanism by which the conduct of the parties may be examined.

In considering the explanation for delay, account must be taken of the limits of institutional resources. Institutional delay runs from the time the parties are ready for trial and continues until the system can accommodate the proceedings. The weight to be given to this factor must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay. There is a point in time after which the Court will no longer tolerate delay which results from resource limitations. An administrative guideline may be used to assess the acceptable

period of time to be allotted to this factor. This guideline is neither a limitation period nor a fixed ceiling on delay. It must not be applied in mechanical fashion but must yield to other factors when required.

It is appropriate for this Court to suggest a guideline of between 8 to 10 months for institutional delay in Provincial Courts. A guideline with respect to institutional delay after committal for trial in the range of 6 to 8 months was suggested in *R. v. Askov*, [1990] 2 S.C.R. 1199, and is still apposite. The application of the guideline will be influenced by the presence or absence of prejudice. The greater the prejudice, the shorter the acceptable period of institutional delay. These guidelines are intended for the guidance of trial courts generally, and will no doubt require adjustment by trial courts to take into account local conditions. They will also need to be adjusted from time to time to reflect changing circumstances. The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions of different regions in the province. The application of these guidelines is subject to review by this Court to ensure that the right to trial within a reasonable time is being respected.

Prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not proved, the basis for the enforcement of the right is seriously undermined. The purpose of the right is to expedite trials and minimize prejudice and not to avoid trials on

the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that must be considered.

In this case the delay of 14-1/2 months is sufficient to raise the issue of reasonableness. Since the parties appeared to be prepared for trial from some time in March 1988 and the trial was not held until March 1989, an institutional delay of about 12 months was involved. In the jurisdiction in which this case arose, a period in the order of 10 months would not be unreasonable for systemic delay given the rapidly changing local conditions. The accused led no evidence of prejudice and little or no prejudice is inferred from the delay as the accused appeared to be content with the pace of litigation. In view of the strain on institutional resources and the absence of any significant prejudice to the accused, the delay in this case was not unreasonable. This conclusion is reached without the necessity of relying on the burden of proof.

Per McLachlin J.: The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. The first step is to determine whether a *prima facie* case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the *prima facie* case is made out, the court must proceed to a closer consideration of the accused's right to a trial within a reasonable time, and the question of whether it outweighs the conflicting societal interest. While the interest of society in bringing those charged with

criminal offences to trial is of constant importance, the interest of the accused varies with the circumstances, and is usually measured by the fourth factor -- prejudice to the accused's interests in security and a fair trial. In this case the accused was able to establish a *prima facie* case, but failed to show that protection of her interest in a prompt trial or the ancillary public interest in prompt justice outweighed the public interest in bringing her to trial.

Per Gonthier J.: The reasons of Sopinka J. were concurred in. As underlined by McLachlin J., the decision as to whether a stay should be granted must rest on a balancing of the prejudice suffered by the accused and the societal interest in bringing the accused to trial. In this case the prejudice to the accused which can be inferred was minimal and is outweighed by the societal interest in bringing her to trial.

Per Lamer C.J. (dissenting): The principles and guidelines set out by Sopinka J. were agreed with, except as regards proof of prejudice. The onus is on the Crown to demonstrate that the delay caused no prejudice to the accused. The onus is on the applicant to establish prejudice only when the applicant is seeking a remedy additional to a stay. In this case, while the Crown has shown that the accused's liberty and fair trial interests have not been affected, it has not even attempted to show that her security interests have not been prejudiced. This kind of prejudice has been suffered beyond the length of time that can be legitimately supported on the basis of limited institutional resources.

Cases Cited

By Sopinka J.

Considered: *R. v. Askov*, [1990] 2 S.C.R. 1199; **referred to:** *R. v. Hurlbert* (1988), 66 C.R. (3d) 391; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Stensrud*, [1989] 2 S.C.R. 1115; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Barker v. Wingo*, 407 U.S. 514 (1972); *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Beason* (1983), 36 C.R. (3d) 73; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *R. v. Bennett* (1991), 6 C.R. (4th) 22; *R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Smith*, [1989] 2 S.C.R. 368.

By McLachlin J.

Referred to: *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Askov*, [1990] 2 S.C.R. 1199.

By Lamer C.J. (dissenting)

R. v. Smith, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *Mills v. The Queen*, [1986] 1 S.C.R. 863.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 11(*b*), 24(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 237(*a*), (*b*).

Criminal Code, R.S.C., 1985, c. C-46, s. 253(*a*), (*b*).

APPEAL from a judgment of the Ontario Court of Appeal (1990), 76 C.R. (3d) 37, 55 C.C.C. (3d) 209, 38 O.A.C. 298, reversing a judgment of the District Court allowing the accused's appeal from her conviction by Dodds Prov. Ct. J. Appeal dismissed, Lamer C.J. dissenting.

Alan J. Risen and *Robert B. Kimball*, for the appellant.

Murray D. Segal and *Kenneth L. Campbell*, for the respondent.

S. R. Fainstein, Q.C., and *R. J. Frater*, for the intervener.

Solicitors for the appellant: Risen, Espey, Oshawa.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

Solicitor for the intervener: John C. Tait, Ottawa.

SUPREME COURT OF CANADA

DARLENE MORIN

v.

HER MAJESTY THE QUEEN

- and -

THE ATTORNEY GENERAL OF CANADA

CORAM: The Chief Justice and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

SOPINKA J.:

The issue in this appeal concerns the right of an accused to be tried within a reasonable time. This right is enshrined in s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* which states:

> 11. Any person charged with an offence has the right...
>
> (*b*) to be tried within a reasonable time;...

Though beguiling in its simplicity, this language has presented the Court with one of its most difficult challenges in search of an interpretation that

respects the right of the individual in an era in which the administration of justice is faced both with dwindling resources and a burgeoning case load. We are asked in this appeal to re-examine the problem in light of the effect on the administration of justice of our decision in *R. v. Askov*, [1990] 2 S.C.R. 1199. Evidence presented to us indicates that between October 22, 1990 and September 6, 1991, over 47,000 charges have been stayed or withdrawn in Ontario alone. The reaction to this has been mixed. On the one hand many applaud the result which has in their view unclogged the system of much dead wood in the form of charges that should not have been laid or having been laid ought to have been dropped. This, they say, will enable the system to more quickly accommodate cases that are more pressing and lessen the period during which alleged criminals are free to roam the streets while awaiting trial. On the other hand, many others deprecate what in their opinion amounts to an amnesty for criminals, some of whom were charged with very serious crimes. They assert that accused persons are discharged when they have suffered no prejudice to the complete dismay of victims who have suffered, in some cases, tragic losses.

The Facts

The facts of this case are neither complicated nor in dispute. On January 9, 1988 the accused was observed by a police officer to be travelling at an excessive rate of speed. She was pulled over by the officer and showed signs of intoxication. As a result of visual observation and a series of co-ordination

tests, the accused was charged with operating a motor vehicle while impaired, contrary to s. 237(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 253(*a*)). The accused was then taken to the police station and given a breathalyzer test after which she was charged with operating a motor vehicle having consumed alcohol in such a quantity that her blood alcohol level exceeded the legal limit, contrary to s. 237(*b*) (now s. 253(*b*)) of the *Code*.

The accused was released from custody on the day of her arrest on a promise to appear. She next appeared in Oshawa Provincial Court on February 23, 1988. Counsel for the accused explicitly requested "the earliest possible trial date" (C.O.A. at p. 15). The trial was set for March 28, 1989. In response to a query from counsel as to whether this was "the earliest date", the presiding justice answered a simple "yes" (C.O.A. at pp. 15-16).

On her scheduled trial date, March 28, 1989, counsel for the accused brought a motion to stay the proceedings pursuant to s. 24(1) of the *Charter* prior to entering a plea, arguing that the 14½ month delay in bringing the accused to trial infringed the accused's right under s. 11(*b*) of the *Charter*. The motion was dismissed. The accused was then convicted of the "over 80" charge and a stay was entered in regard to the impaired driving charge. On appeal to the summary conviction appeal court, the "over 80" charge was also stayed on the basis that the accused had not been tried within a reasonable time. A further appeal to the Court of Appeal for Ontario was allowed and the conviction restored.

Judgments

A. *Ontario Provincial Court*

Dodds Prov. Ct. J. relied heavily on the case of *R. v. Hurlbert* (1988), 66 C.R. (3d) 391 (Ont. H.C.), in which an 18-month delay prior to trial was found to be reasonable. In that case, Doherty J. (as he then was) determined that while such a long delay was *prima facie* excessive and warranted a further examination of other factors, the totality of the circumstances did not justify a stay. Dodds Prov. Ct. J. went on to conclude that:

> In this particular case the delay is 14½ months, not 18 months. There was no expression of concern by the representative of the accused when the trial date was set except to say "is that the earliest date?" there was no declaration of prejudice at that time and none has since been shown. In all of the circumstances I feel that this case falls well within the principal [*sic*] discussed by Mr. Justice Doherty in Hurlbert and the motion will be refused. [C.O.A. at p. 867)

The accused was subsequently found guilty of the "over 80" charge and a stay was entered on the impaired driving charge. As a result, the accused was fined $700.00 and her driver's licence was suspended for 15 months.

B. *District Court of Ontario*

Murphy Dist. Ct. J. stated that he was bound by the then recently released reasons of this Court in *R. v. Conway*, [1989] 1 S.C.R. 1659. His Honour distinguished the *Hurlbert* case relied upon by the trial judge.

Murphy Dist. Ct. J. then applied the test for unreasonable delay as set out in *Conway*. He concluded that the major reason for the delay in this case was the lack of institutional resources. He rejected the suggestion by the Crown that the appellant was required to assert her right to a prompt trial under s. 11(*b*). Murphy Dist. Ct. J. agreed that some allowance must be made for the strain on judicial resources, but indicated that "[t]his case is perhaps unusual in its lack of complicating factors" (C.O.A. at p. 874). Given the lack of complexity of the case he could not accept that a delay of 14½ months was justified. Accordingly, he concluded that the appellant had not been tried within a reasonable time. The appeal was allowed and a stay of proceedings entered. Additionally, in the event that he was wrong on the conviction appeal, Murphy Dist. Ct. J. allowed the sentence appeal of the accused and reduced her licence suspension to 12 months.

C. *Court of Appeal* (1990), 76 C.R. (3d) 37

The Court of Appeal acknowledged that the sole source of delay in this case was attributable to limits on institutional resources. In view of this Court's statement in *R. v. Stensrud*, [1989] 2 S.C.R. 1115, that "[t]he provincial courts of appeal are generally in a better position than this Court to assess the reasonableness of their province's institutional limitations and resources" (at p. 1116), the court sat as a five-member panel and invited the parties to file further material bearing upon that issue. A significant amount of additional information was filed. After reviewing portions of the material, the court noted that the problem of delay was still serious, despite initiatives by the government to address the problem.

The court then proceeded to apply the four factors referred to in *R. v. Smith*, [1989] 2 S.C.R. 1120, against the facts of the case. The court first considered the issue of prejudice to the appellant and concluded that only minimal weight should be given to this factor. The appellant had suffered no actual prejudice (she neither testified nor called any witnesses) and any presumed prejudice from the delay was not significant. The court next considered waiver, concluding that the appellant had not waived any of the delay. In dealing with the issue of the length of the delay, the court indicated that in isolation, the length of the delay was excessive.

In considering the second factor discussed in *Smith*, *supra*, the court noted that with only police witnesses and a certificate of analysis, this was a "routine" case to prosecute. In fact, the police investigation was over on the day of the arrest. The court concludes that "inherent time requirements formed no part of the reason for the delay" (p. 46).

The Court of Appeal concluded that the sole reason for the delay was the limit upon institutional resources. The court considered the situation in the District of Durham and concluded that systemic delay was approaching a crisis level. The court added, however, that the government recognized the problem and was attempting to address it. It acknowledged that "the problems with the administration of justice were enormously complex and were not amenable to a quick fix or magic solution" (p. 49). In view of the efforts of the government to reduce delay, the court was willing to view systemic delay in a sympathetic manner.

Finally, the Court of Appeal considered the need for a transitional period to give the government time to discharge its burden of providing trials within a reasonable time. It held that such a transitional period was required and "having regard to the extent and intractability of the problem . . . the transitional period cannot be a short one" (pp. 52-53). The Court of Appeal added that the leeway to be given to systemic delay during the transitional period should be considerable when balancing the factors enunciated in *Smith, supra*. Any other

conclusion "would be tantamount to an amnesty . . . [and] [t]hat such an amnesty is undesirable is patently obvious" (p. 55).

The court concluded that taking into consideration all of the factors set out in *Smith, supra*, the appellant's right to be tried within a reasonable time had not been infringed. The appeal was therefore allowed, the conviction entered at trial restored, and the sentence as "modified" by Murphy Dist. Ct. J. on appeal, affirmed.

Points in Issue

The major issue to be determined in this appeal is whether the accused's right to a trial within a reasonable time as guaranteed by s. 11(*b*) of the *Charter* has been infringed by the delay experienced in this case. A subsidiary issue arises if the answer to the above question is in the affirmative. That subsidiary question is whether the delay can be excused as a result of the need for a transitional period to allow the government to discharge its burden of providing trials within a reasonable time.

Jurisprudential Development of s. 11(*b*)

The development of the jurisprudence relating to s. 11(*b*) is instructive in that it underscores the importance of avoiding rigidity in the interpretation of new constitutional rights early in the life of a constitutional document. The Court could have simply adopted the American approach articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), which has resulted in only the most egregious delays being proscribed. Instead, in accordance with the intent of the *Charter*, this Court has attempted to develop a Canadian approach with due regard for the American experience. Embarking as we did on uncharted waters it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience.

In *Mills v. The Queen*, [1986] 1 S.C.R. 863, *R. v. Rahey*, [1987] 1 S.C.R. 588, and *R. v. Conway*, *supra*, the Court developed the basic criteria for the application of s. 11(*b*). Not surprisingly, the broad and general language of the section gave rise to differences of opinion as to the criteria to be applied and their content. In an effort to develop a common approach which would supply some guidance but leave trial courts and courts of appeal flexibility to take into account local conditions, this Court in *Smith*, *supra*, distilled the jurisprudence in *Mills, Rahey* and *Conway* into four basic criteria to be applied in determining whether delay was unreasonable. In the week preceding release of the reasons

in *Smith*, we heard the appeal in *Stensrud*, *supra*, in which we were invited to reverse a decision of the Court of Appeal of Saskatchewan reversing the trial judge who had refused a stay. On the basis of evidence before it, the Court of Appeal found the delay to be unreasonable. Mindful of the fact that *Smith* was about to be released, we declined to embark on another examination of the principles underlying s. 11(*b*). We were satisfied that the Court of Appeal had correctly assessed the effect of limitations on institutional resources. In this regard we stated that:

> The provincial courts of appeal are generally in a better position than this Court to assess the reasonableness of their province's institutional limitations and resources. [At p. 1116.]

Finally, in *Askov*, we dealt with a case which came to us from the Court of Appeal for Ontario and originated in Brampton, Ontario, a notorious sore spot in relation to unreasonable delay. Applying the basic criteria in *Smith*, the Court was unanimous that the delay was unreasonable. The Court went on to suggest that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable" (p. 1240). It is the interpretation and application of this statement that resulted in the large number of stays and withdrawals to which I have referred.

This appeal came before the Court of Appeal for Ontario after the release of our judgments in *Smith* and *Stensrud* but before *Askov*. I have already indicated that the court invited the parties to provide additional evidence with respect to the situation in the District of Durham relating to institutional limitations and resources. It was in this jurisprudential and evidentiary setting that the Court of Appeal reached its decision.

The Purpose of s. 11(*b*)

The primary purpose of s. 11(*b*) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this Court. I will address each of these interests and their interaction.

The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail

conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused ..." (p. 96). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

The Approach to Unreasonable Delay - The Factors.

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. the length of the delay;

2. waiver of time periods;

3. the reasons for the delay, including

   (a) inherent time requirements of the case,
   (b) actions of the accused,
   (c) actions of the Crown,
   (d) limits on institutional resources, and
   (e) other reasons for delay; and

4. prejudice to the accused.

These factors are substantially the same as those discussed by this Court in *Smith, supra*, at p. 1131, and in *Askov, supra*, at pp. 1231-32.

The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(*b*) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See *R. v. Kalanj*, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(*b*) seeks to protect, the explanation for the delay and the prejudice to the accused.

The role of the burden of proof in this balancing process was set out in the unanimous judgment of this Court in *Smith*, *supra*, as follows:

> I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the

> reasonableness of the overall lapse of time having regard to the factors referred to above. [At pp. 1132-33.]

I do not read the *Askov* decision as having departed from this statement although portions of the reasons of Cory J. emphasized certain aspects of the evidentiary burden on the Crown.

A definition of each of these factors and their interaction follows. I will deal with them in the order that they should be considered by a trial court.

1. *The Length of the Delay*

As I have indicated, this factor requires the court to examine the period from the charge to the end of the trial. Charge means the date on which an information is sworn or an indictment is preferred (see *Kalanj*, *supra*, at p. 1607). Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the *Charter*. The applicant has the legal burden of establishing a *Charter* violation. The inquiry, which can be complex (as may be illustrated by the proceedings in the Court of Appeal in this case), should only be undertaken

if the period is of sufficient length to raise an issue as to its reasonableness. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If, for example, the applicant is in custody, a shorter period of delay will raise the issue.

2. *Waiver of Time Periods*

If the length of the delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegation of waiver before embarking on the more detailed examination of the reasons for delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted.

This Court has clearly stated that in order for an accused to waive his or her rights under s. 11(*b*), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights (*Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at p. 49; see also *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at pp. 394-96; *Askov, supra*, at pp. 1228-29). Waiver can be explicit or implicit.

If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in *Askov, supra*:

> ... there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(*b*) guarantee, understood its nature and has waived the right provided by that guarantee. [At p. 1228.]

Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in *Smith, supra*, which was adopted in *Askov, supra*, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.

In *R. v. Bennett* (1991), 6 C.R. (4th) 22 (Ont. C.A.), Arbour J.A. alluded to the problem that arises in applying the principles of waiver in respect of accused who agreed to trial dates prior to the release of the *Askov* decision. Presumably the accused could contend that in agreeing to dates they were not fully aware of their rights. No doubt this is a factor that must be considered by the court hearing the application and it is not appropriate for this Court to make

any general pronouncement as to whether waiver would or would not apply in the circumstances. Any alleged misapprehension of rights by reason of the apprehended state of the law before *Askov* must be considered in light of these reasons.

(3) *The Reasons for the Delay*

If the application by an accused is not resolved by reason of the principles of waiver, the court will have to consider the other explanations for delay. Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay. I now turn to a closer examination of each of these reasons and the role each plays in determining what delay is unreasonable.

(a) Inherent Time Requirements

All offences have certain inherent time requirements which inevitably lead to delay. Just as the firetruck must get to the fire, so must a case be prepared. The complexity of the trial is one requirement which has often been mentioned. All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins. For example, a fraud case may involve the analysis of many documents, some conspiracies may involve a large number of witnesses and other cases may involve numerous intercepted communications which all must be transcribed and analyzed. The inherent requirements of such cases will serve to excuse longer periods of delay than for cases which are less complex. Each case will bring its own set of facts which must be evaluated. Account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case. The amount of time that should be allowed counsel is well within the field of expertise of trial judges.

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and

the simpler the form each activity takes, the shorter should be the delay. The respondent suggests that this Court should set an administrative guideline for such an "intake period". We decline to do so on the basis of the record that is before us. The length of time necessary will be influenced by local practices and conditions and should reflect that fact. No doubt the intake period in a particular region will tend to be the same for most offences. There may, however, be a significant variation between some categories of offences, such as between summons cases and cases of arrest. This will mean that courts in a particular region will tend to hear the same evidence repeated with each s. 11(*b*) application. It will then become apparent that this period falls within a range of a certain number of weeks or months. A *de facto* administrative guideline will thus develop that will reflect conditions in that region.

Another inherent delay that must be taken into account is whether a case must proceed through a preliminary inquiry. Clearly a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for cases which do not require a preliminary hearing. Equally, a two-stage process will involve additional inherent delays such as further pre-trial meetings and added court dates. An additional period for inherent time requirements must be allowed for this second stage. This period will be shorter than in the case of the one-stage trial process because many of the intake procedures will not have to be duplicated.

(b) Actions of the Accused

This aspect of the reasons for the delay should not be read as putting the "blame" on the accused for certain portions of delay. There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading are all actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken. Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc. I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable.

An example of such actions is provided by *Conway*, *supra*. In *Conway*, the accused made a number of requests which led to the proceedings being delayed. Those requests included a change of venue motion, changes of solicitor and a request that the accused be allowed to re-elect trial by judge alone. A further example is provided in *Bennett*, *supra*, where the accused made an election at his scheduled Provincial Court trial to be tried in the then District Court. This converted a scheduled trial into a preliminary inquiry. While the type of action of the accused in both these cases was unquestionably *bona fide*, each action

contributed to the delay and must therefore be taken into consideration in determining whether the overall delay suffered by the accused was reasonable.

(c) Actions of the Crown

As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in *Smith*, *supra*, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.

(d) Limits on Institutional Resources

Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(*b*) of the *Charter*. It was the major source of the delay in *Askov*. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that

there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(*b*) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(*b*), account must be taken of this fact of life. As stated by Lamer J. (as he then was) in *Mills* (at p. 935), and approved in *Askov*:

> In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources. [At p. 1225.]

How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(*b*) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be

referred to as an administrative guideline. I hasten to add that this guideline is neither a limitation period nor a fixed ceiling on delay. Such a guideline was suggested in *Askov* and was treated by some courts as a limitation period. I propose therefore to examine in some detail the purpose of a guideline commencing with an examination of its role in *Askov*.

In *Askov* we were dealing with a period of delay of approximately 2 years subsequent to committal for trial. All of this delay was institutional or systemic delay. Applying the factors that had crystallized in *Smith, supra,* we concluded that the delay was clearly unreasonable. In his reasons, which in this respect were unanimous, Cory J. did go on to state:

> ... a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable. [At p. 1240.]

With respect to institutional factors, he stated:

> The question must be answered in light of the particular facts of each case. There can be no certain standard of a fixed time which will be applicable in every region of the country. [At p. 1226.]

The purpose of the suggested period was not therefore that it was to be treated as a limitation period and inflexible. The purpose in expressing a guideline is two-fold. First, as I have already indicated, it is to recognize that

there is a limit to the delay that can be tolerated on account of resource limitations. Second, it is to avoid each application pursuant to s. 11(*b*) being turned into a trial of the budgetary policy of the government as it relates to the administration of justice. The flavour of such a proceeding can be appreciated by a perusal of the voluminous record before the Court in this case.

A number of considerations enter into the adoption of a guideline and its application by trial courts. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. This premise enters into its formulation. The Court must acknowledge that a guideline is not the result of any precise legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion. With respect to the use of statistics, care must be taken that a comparison of jurisdictions is indeed a comparative analysis. For example, in *Askov* we were given statistics with respect to Montreal in an affidavit by Professor Baar. Subsequently, it was brought to our attention that this was a misleading comparison. Evidence was led in this appeal showing that the manner in which criminal charges are dealt with in Montreal and Brampton is sufficiently dissimilar so as to make statistics drawn from the two jurisdictions of limited comparative value. Comparison with other jurisdictions is therefore to be applied with caution and only as a rough guide. These then are the factors

which enter into the formulation by an appellate court of a guideline with respect to administrative delay. I now turn to its application in the trial courts.

I have already stressed that a guideline is not to be treated as a fixed limitation period. It will yield to other factors. Rapidly changing conditions may place a sudden and temporary strain on resources. This was the situation in the District of Durham in which this case arose. Such changing conditions should not result in an amnesty for persons charged in that region. Rather this fact should be taken into account in applying the guideline. On the other hand, when the case load has been constant over a substantial period of time the delay envisaged by the guideline may be regarded as excessive. In this appeal, the Court of Appeal purported to apply a transitional period to accommodate the situation in Durham. While a transitional period may have been appropriate immediately after the *Charter* came into effect, it is not appropriate any longer. This Court so held in *Askov*. The use of a transitional period implies a fixed period during which unreasonable delay will be tolerated while the system adjusts to a new set of rules. It imposes a general moratorium on certain *Charter* rights. For this reason and quite apart from the statement in *Askov* that the transitional period had ended, I would not find it appropriate in this case. It appears to me undesirable to impose a moratorium on *Charter* rights every time a region of the country experiences unusual strain on its resources. It is preferable to simply

treat this as one factor in the overall decision as to whether a particular delay is unreasonable.

The application of a guideline will also be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact.

In this case we are dealing with the Provincial Court. The suggested period of institutional delay ranges from 6 to 10 months. The respondent suggests that 8 to 10 months of purely systemic delay would not be unreasonable in the Provincial Court. It admits, however, that it is aiming at institutional delay of no more than 6 to 8 months in Provincial Court. Arbour J.A. in *Bennett, supra*, suggests "a delay of 8½ to 9 months in getting a case to trial in the Provincial Court, although not a model of brevity, is not outside the range of reasonableness" (p. 41).

In *Askov*, Cory J., after reviewing comparative statistics suggested that a period in the range of 6 to 8 months between committal and trial would not be unreasonable. Based on the foregoing, it is appropriate for this Court to suggest a period of institutional delay of between 8 to 10 months as a guide to Provincial

Courts. With respect to institutional delay after committal for trial, I would not depart from the range of 6 to 8 months that was suggested in *Askov*. In such a case this institutional delay would be in addition to the delay prior to committal. This reflects the fact that after committal the system must cope with a different court with its special resource problems. It is therefore essential to take into account the inevitability of this additional institutional delay.

A longer period of institutional delay for Provincial Courts is justified on the basis that not only do these courts dispose of the vast majority of cases, but that on average it takes more time to dispose of cases by reason of the demands placed on these courts. Statistics for 1987 submitted by the respondent show a median delay in New Brunswick of 152 days for Provincial Court and 72 days for upper courts. Delay in London, Ontario was shown to be 239 days in Provincial Court and 105 in upper courts; Toronto, St. Catharines and Ottawa showed delays of 315 to 349 days in Provincial Court and 133 to 144 days in upper courts; median delays in Brampton were 607 days for Provincial Court and 423 for upper courts. Figures for Vancouver were similar to London and for New Westminster comparable to Toronto, St. Catharines and Ottawa.

These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances.

The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province.

The application of these guidelines under the supervision of the court of appeal is subject to the review of this Court to ensure that the right to trial within a reasonable time is being respected. In this regard I wish to reiterate what this Court said in *Stensrud*, *supra*:

> The provincial courts of appeal are generally in a better position than this Court to assess the reasonableness of their province's institutional limitations and resources. Nevertheless, they must decide applications under s. 11(*b*) on the basis of correct principles. [At p. 1116.]

(e) Other Reasons for Delay

There may be reasons for delay other than those mentioned above, each of which should be taken into consideration. As I have been at pains to emphasize, an investigation of unreasonable delay must take into account all reasons for the delay in an attempt to delineate what is truly reasonable for the case before the court. One such factor which does not fit particularly well into any other category of delay is that of actions by trial judges. An extreme example is provided by *Rahey, supra*. In that case it was the trial court judge who caused a substantial amount of the delay. Nineteen adjournments over the course of 11

months were instigated by the judge during the course of the trial. Such delay is not institutional in the strict sense. Nevertheless, such delay cannot be relied upon by the Crown to justify the period under consideration.

Other delays that have not been mentioned may weigh against the accused, but in most cases delays will weigh against the Crown for the same reason as was discussed in the above example.

4. *Prejudice to the Accused*

Section 11(*b*) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion. We have decided in several judgments, including the unanimous judgment in *Smith*, *supra*, that the right protected by s. 11(*b*) is not restricted to those who demonstrate that they desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. In the American concept of this principle, expounded in *Barker v. Wingo*, the inference is that no prejudice has been suffered by the accused unless he or she asserts the right. While the observation of Dubin C.J.O. in *Bennett* that many, perhaps most, accused are not anxious to have an early trial may no doubt be accurate, s. 11(*b*) was designed to

protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.

This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see *Askov, supra*, at pp. 1225, 1227, 1229). While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. This view is summed up by Doherty J. (as he then was) in a paper given to the National Criminal Law Program in July 1989 which was referred to with approval by Dubin C.J.O. in *Bennett* (at p. 52) and echoes what has been noted by numerous commentators:

> An accused is often not interested in exercising the right bestowed on him by s. 11(*b*). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.

As also noted by Cory J. in *Askov, supra*, "the s. 11(*b*) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of

the accused" (p. 1222). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(*b*) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions of this Court in regard to other *Charter* provisions. For example, this Court has held that an accused must be reasonably diligent in contacting counsel under *Charter* s. 10(*b*) (*R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Smith*, [1989] 2 S.C.R. 368). If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words

adopted by Lamer J. in *Mills*, *supra*, at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.

Application to this Case

1. *The Length of the Delay*

The accused was charged on January 9, 1988 and her trial was completed on March 28, 1989. The total period of time between charge and trial was therefore approximately 14½ months. For reasons which I will explain later in these reasons, the accused at no time waived her right to a trial within a reasonable time nor did she waive her right in regard to any particular time periods. The length of delay therefore totalled just over 14½ months.

A delay of 14½ months in bringing a case to trial can hardly be described as a model of dispatch. On the other hand 14½ months is a time period which may be excused in suitable circumstances. The length of the delay is sufficient to raise the issue of reasonableness and the inquiry must turn to the reason why it took 14½ months to bring Ms. Morin to trial.

2. *Waiver of Time Periods*

Waiver must be clear and unequivocal and with full knowledge of the right one is waiving. In the circumstances of this case, it cannot be said that the accused waived any of her rights at any time. She neither explicitly waived her rights nor can one infer from her actions an intent to waive her rights. I am in agreement with the lower courts which concluded that there was no waiver in this case.

3. *The Reasons for the Delay*

(a) Inherent Time Requirements

The accused was charged with what is commonly referred to as "over 80" and impaired. These charges resulted from a roadside stop followed by a breathalyzer test taken at the police station. Subject to certain paperwork, the preparation of the case for the prosecution was essentially complete by the time

the accused was released from custody shortly after her breathalyzer test. This was therefore not a complicated case from the perspective of the prosecution. All prosecution witnesses were police officers and all relevant testing and investigation were completed on the day of the arrest of Ms. Morin.

Although the investigation by the Crown may have been completed on the day of arrest, the case for the defence was merely beginning. This is most easily exemplified by the fact that Ms. Morin could hardly have been expected to be ready for trial, for example, the next day. She required a certain amount of time to complete preliminary matters such as consulting and retaining counsel. Additionally, counsel would have needed some time to consider and prepare her case. Equally, certain time would have been required by the prosecution to finish the required paperwork and by the judicial administration to bring the case into the system. All of these activities take time and all legitimize some delay.

Ms. Morin was before the Court for her first appearance on February 23, 1988, six weeks after her arrest. At this time she had retained counsel and requested "the earliest date" for trial. By this date it appears that most of the preliminary matters of both the prosecution and the defence had been completed. As counsel for the defence did not indicate a readiness for trial but merely a request for the earliest trial date it is somewhat unclear whether the case for the defence was as yet ready for trial. It may be inferred however that both parties

were ready for trial within a few weeks of the first appearance. Accordingly, the inherent time requirements for this case were about two months.

(b) Actions of the Accused

At her first court appearance, the accused requested the earliest date for trial. In response to her request, she was given a trial date of March 28, 1989, fully 13 months in the future. The accused enquired as to whether this was actually "the earliest date" available and the presiding judge indicated a simple "yes". Other than this court appearance there is no action on record taken by the accused from the point of her charge until her date of trial. The inaction on the part of the accused will be considered further in assessing prejudice.

(c) Actions of the Crown

The appellant admits that there is nothing in the record to suggest that the Crown was in any way dilatory in proceeding in this matter. In fact, the appellant concedes that the Crown was anxious to get the case to trial. As discussed later in these reasons, counsel for the Crown sent a "form" letter to all defence counsel in the Durham region suggesting that earlier dates might be available for accused who were anxious for trial. While it is alleged that this letter may have been sent too late to help Ms. Morin, it does show some positive

action by the Crown to expedite trial. None of the delay is therefore attributable to the action of the Crown.

(d) Limits on Institutional Resources

Perhaps the single most important factor in this case is the limit on institutional resources. It appears that from some time in March, 1988 until March, 1989, the parties were prepared for trial but the judicial system could not accommodate them. It is somewhat unclear whether a date in early 1989 could have been made available as a result of the letter from the Crown's office but I am prepared to infer from the totality of the facts that an institutional delay of about 12 months was involved. This time period is the time from which the parties were ready for trial until the point at which the courts were able to accommodate this case.

In considering the reasonableness of this delay, the court must consider the facts surrounding this institutional delay. It must be remembered that this appeal arises from Ontario Provincial Court and arises from a region which has experienced significant growth in recent years.

I will deal first with the consideration which must be given to the fact that we are dealing with a Provincial Court. The Ontario Provincial Court disposes of approximately 95% of criminal cases in Ontario. Evidence led by the

Crown in this appeal shows that the caseload of this Provincial Court increased more than 125% from 1985/86 to 1989/90. After several years in which the caseload was stable at 80,000 cases, the caseload of the Provincial Court in Ontario increased from 80,000 to 180,000 from 1985/86 to 1989/90. This rapid increase in caseload cannot, of course, always be predicted, nor can the government respond immediately to the inevitable strain on resources. While this Court has made it clear that there is no longer any general transitional period in which to allow the government to comply with its constitutional obligations to provide sufficient facilities, this does not remove the issue of changing local circumstances from consideration.

In the jurisdiction in which this case arose, the District of Durham, the increase in caseload from 1985/86 to 1990/91 was approximately 70% in adult court and an astounding 143% in youth court. This was only partially caused by a population increase of 40% during the previous decade. Thus it is not surprising that the provision of institutional resources may have lagged somewhat behind the demand. Since some time in July, 1990, however, it appears that the Durham Provincial Court has been able to dispose of cases at a more rapid rate than it has received new cases. While one cannot use institutional resources to nullify the right to be tried within a reasonable time, one also cannot use rapidly changing local conditions to compel a general amnesty. Based on the above factors, I would allow a period for systemic delay which is in the upper range of the guideline. In my view, a period in the order of 10 months would not be

unreasonable. While I have suggested that a guideline of 8 to 10 months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice.

(e) Other Reasons for Delay

There do not appear to be any other reasons for delay in this case beyond those already considered in these reasons.

4. *Prejudice to the Accused*

The accused led no evidence of prejudice. The Court must still consider what, if any, prejudice is to be inferred from the delay. In this regard the Crown relies on the fact that several months prior to trial, counsel in the Durham region received a letter dated January 16, 1989 from the Crown Attorney's office which stated in part:

> [i]f you wish to move any of your cases up or feel that any clients are suffering prejudice as a result of delay please give Audrey or I a shout and we'll try to locate an earlier date. Thank you for your co-operation. [Emphasis added.] [C.O.A., at p. 38.]

It may be unrealistic to suggest that a trial set for approximately two months from the date of this letter could have been significantly moved up but we will never know what would have happened as the accused did not request any action. While the accused was not required to do anything to expedite her trial, her inaction can be taken into account in assessing prejudice. I conclude for this reason that the accused was content with the pace with which things were proceeding and that therefore there was little or no prejudice occasioned by the delay.

Disposition

Applying the guideline to which I have referred and taking into account the strain on institutional resources, the reasons of the Court of Appeal in regard thereto and the absence of any significant prejudice, I am of the opinion that the delay in this case was not unreasonable. I have come to this conclusion without the necessity of resorting to the burden of proof.

In view of the result at which I have arrived, it is unnecessary to consider the argument of the Attorney General of Canada that a stay is not the only remedy available for an infringement of the right protected by s. 11(*b*). The appellant's rights under s. 11(*b*) have not been violated and the appeal is dismissed.

SUPREME COURT OF CANADA

DARLENE MORIN

- v. -

HER MAJESTY THE QUEEN

- and -

THE ATTORNEY GENERAL OF CANADA

CORAM: The Chief Justice and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

GONTHIER J.:

I concur in the reasons of Justice Sopinka and agree with the observations of Justice McLachlin underlining that in the final analysis the decision as to granting a stay must rest on a balancing of the prejudice suffered by the accused and the societal interest in bringing the accused to trial.

With respect to the determination of prejudice to the accused, the onus which rests upon the Crown may be met either by direct evidence or by

inference, whether it be to establish the absence of prejudice or its extent or degree. By reason of the circumstances outlined by Sopinka J., particularly the conduct of the accused in relation to the proceedings and the fact that the delay only exceeded the guideline for institutional delay to a limited extent, I reach the conclusion that the prejudice to be inferred as suffered by the accused was minimal and is outweighed by the societal interest in bringing her to trial.

I would accordingly dismiss the appeal.

SUPREME COURT OF CANADA

DARLENE MORIN

- v -

HER MAJESTY THE QUEEN

- and -

THE ATTORNEY GENERAL OF CANADA

CORAM: The Chief Justice and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

McLACHLIN J.:

I have read the reasons of Justice Sopinka and agree that the appeal should be dismissed. I should like, however, to add certain observations on the nature of the right to trial within a reasonable time and the practical application of the factors relevant to determining a breach of this right.

It is easy, in considering the factors which can bear on that determination, to lose sight of the true issue at stake -- the determination of where the

line should be drawn between conflicting interests. On the one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.

On the other side of the balance stands the right of a person charged with an offence to be tried within a reasonable time. When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.

The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

The factors to be considered include the length of the delay, any waiver by the accused of the delay, the reasons for the delay and prejudice to the accused. But simply listing factors does not resolve the dilemma of a trial judge faced with an application for a stay on grounds of delay. What is important is how those factors interact and what weight is to be accorded to each. In this connection, we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay.

In my opinion, the task of a trial judge considering an application for a stay of charges may usefully be regarded as falling into two segments. The first step is to determine whether a *prima facie* or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the delay is reasonable having regard to similar cases, the application will fail. If the accused has waived his or her right to an early trial date, the application will fail. If the reasons for the delay are in large part attributable to the accused, the *prima facie* case will not be made out and it is unnecessary to proceed further. Where waiver or accused-caused delay are not factors, the determination of whether a *prima facie* or threshold case has been made out may in many cases resolve itself by reference to "norms" representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances.

If this threshold or *prima facie* case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interest of society in bringing a person charged with a criminal offence to trial. The question is whether, on the facts of the particular case, the interest of society in requiring the accused person to stand trial is outweighed by the injury to the accused's rights and detriment to the administration of justice which a trial at a later date would inflict. The interest of society in bringing those charged with criminal offences to trial is of constant importance. The interest of the accused, on the other hand (and the correlative negative impact of delay on the administration of justice) varies with the circumstances. It is usually measured by the fourth factor -- prejudice to the accused's interests in security and a fair trial. It is the minimization of this prejudice which has been held to be the main purpose of the right under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time: *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1672.

An accused person may suffer little or no prejudice as a consequence of a delay beyond the expected and normal. Indeed, an accused may welcome the delay. On the other hand, an accused person can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great. On the other hand, where

the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require a stay.

How is prejudice sufficient to outweigh the important public interest in bringing those charged with criminal offences to trial to be established? The matter is essentially a question of fact, dependent on the circumstances of the case. As Sopinka J. points out, the length of delay itself in many circumstances may not support the inference of sufficient prejudice to justify a stay of proceedings. It is well known that accused persons may seek to delay trial and to use the "protective shield" of s. 11(*b*) as an "offensive weapon", as Cory J. put it in *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1222. Where no inference as to prejudice can be drawn from the length of the delay, or where the most reasonable inference is the other way, the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial.

In the case at bar, the accused was able to meet the first hurdle of establishing a *prima facie* case. The delay was longer than it should have been, given the nature of the charge and the time reasonably required for processing it. But she failed to show that protection of her interest in a prompt trial or the ancilliary public interest in prompt justice outweighed the public interest in bringing her, a person charged with a criminal offence, to trial. The record permits no inference that her interests in security or the right to a fair trial were adversely affected. In short, the delay appears to have been of little consequence. In the absence of other evidence

to establish the need for a stay, the public interest in proceeding to trial was bound to prevail. The trial judge was right to dismiss her application for a stay of proceedings.

I would dismiss the appeal.

DARLENE MORIN

v.

HER MAJESTY THE QUEEN

- and -

THE ATTORNEY GENERAL OF CANADA

CORAM: The Chief Justice and La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

THE CHIEF JUSTICE:

I have read the reasons of my colleagues, Justices Sopinka and McLachlin. With respect, I cannot agree with their disposition of this case. I would allow the appeal and restore the stay entered by Murphy Dist. Ct. J. of the summary conviction appeal court.

I agree with the principles and guidelines set out by my brother Sopinka J., except as regards proof of prejudice.

While in *R. v. Smith*, [1989] 2 S.C.R. 1120, we did not decide whether prejudice is conclusively presumed or to be inferred, in *R. v. Askov*, [1990] 2 S.C.R. 1199, the reasons of Cory J., concurred in by Dickson C.J. and La Forest, L'Heureux-Dubé and Gonthier JJ., and concurred in on this point in separate reasons by Sopinka and McLachlin JJ., placed "the onus on the Crown to demonstrate ... that the delay caused no prejudice to the accused". Indeed, at p. 1232 of his reasons, Cory J. states:

> (iv) Prejudice to the Accused.
>
> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.
>
> I believe that the factors that I have set out in large measure are substantially the same as those enunciated by L'Heureux-Dubé J. in *Conway* and Sopinka J. in *Smith*. The aim of this test is to provide a method based upon the underlying purposes of s. 11(*b*) which will permit courts to balance the applicable substantive factors in a consistent manner. It bears repeating that the balance between the explicit, individual protection and the implicit, societal aspect of s. 11(*b*) is addressed by placing the onus on the Crown to demonstrate that any action of the accused deliberately caused the delay or constituted waiver, or that the delay caused no prejudice to the accused. [Emphasis added.]

My understanding of Cory J.'s reasons is that the onus is on the applicant as regards prejudice only when the applicant is seeking a remedy additional to a stay. If any

ambiguity in that regard is present (and I find none) at p. 1232 of his reasons the reasoning preceding this summary makes it amply clear. At page 1230 of his reasons, Cory J. states:

> Furthermore, the option left open by Sopinka J. in the *Smith* case whereby accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice on their own initiative in order to strengthen their position in seeking a remedy under s. 24(1) of the *Charter* is consistent with the primary concern of protecting the individual's right under s. 11(*b*).

While I dissented as regards the approach of Cory J. on prejudice, that approach was concurred in by six other judges. My views on the issue which I have held since *Mills v. The Queen*, [1986] 1 S.C.R. 863, and throughout s. 11(*b*) judgments in this Court, have conclusively been put to rest by *Askov* and I hereon in feel bound by it. Furthermore, as *Askov* is a very recent decision of this Court, I do not think it desirable that it be revisited in this case.

Both of my colleagues in their reasons, McLachlin J. somewhat more so than Sopinka J., place the onus on the accused to prove prejudice. This is a fundamental change to the position that this Court has taken. While I have never changed my mind as regards my dissenting position, I will, as I should, apply *Askov* to the facts of this case. Leaving the onus on the Crown, it has shown that Ms. Morin's liberty and fair trial interests have not been affected. But it has not even attempted

to show that her security interests have not been affected; by that I mean the kind of prejudice I described in *Mills*, *supra*, at p. 920, "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". I conclude that this kind of prejudice has been suffered beyond the length of time that can be legitimately supported on the basis of limited institutional resources.

A-777-90

Mohammed Inman Akthar (*Applicant*)

v.

Minister of Employment and Immigration (*Respondent*)

A-780-90

Saijad Hussein (*Applicant*)

v.

Minister of Employment and Immigration (*Respondent*)

A-942-90

Mohammed Azad (*Applicant*)

v.

Minister of Employment and Immigration (*Respondent*)

INDEXED AS: AKTHAR v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION) (C.A.)

Court of Appeal, Pratte, Hugessen and Desjardins JJ.A.—Edmonton, March 13 and 14; Ottawa, June 7, 1991.

Immigration — Refugee status — Extraordinary delays between time of refugee status claims and first stage Tribunal decisions finding no credible basis — That applicants may have passed credible basis test had hearing been held promptly not impacting on justice of matter — Purpose of refugee system not to provide easy means for immigrants to find more desirable country of residence — If applicants no longer reasonably fearing persecution in homeland, cannot complain of unjust treatment in that refugee status claims denied — Possibility delay in holding refugee hearing could give rise to Charter remedy not excluded.

Constitutional law — Charter of Rights — Life, liberty and security — Refugee status claims found to lack credible basis following extraordinary delay in first stage decision — Applicants would probably have passed credible basis test if hearing held promptly — Whether unreasonable delay in processing claims breaching Charter right to fundamental justice and amounting to cruel and unusual treatment — Refugee claimants not enjoying Charter rights of criminal accused — Claimants having to satisfy credible basis test — No Charter remedy for delay in absence of prejudice — No prejudice to applicants if no longer reasonable to fear persecution in home-

A-777-90

Mohammed Inman Akthar (*requérant*)

c.

Ministre de l'Emploi et de l'Immigration (*intimé*)

A-780-90

Saijad Hussein (*requérant*)

c.

Ministre de l'Emploi et de l'Immigration (*intimé*)

A-942-90

Mohammed Azad (*requérant*)

c.

Ministre de l'Emploi et de l'Immigration (*intimé*)

RÉPERTORIÉ: AKTHAR c. CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION) (C.A.)

Cour d'appel, juges Pratte, Hugessen et Desjardins, J.C.A.—Edmonton, 13 et 14 mars; Ottawa, 7 juin 1991.

Immigration — Statut de réfugié — Laps de temps extraordinaires entre la formulation des revendications du statut de réfugié et les décisions du premier palier d'audience concluant à l'absence du minimum de fondement — Bien que la revendication des parties requérantes eût probablement satisfait au critère du minimum de fondement si leur audition avait eu lieu plus rapidement, cela n'a aucune incidence sur le caractère équitable de la question — L'objet du système applicable aux réfugiés n'est pas de fournir aux immigrants un moyen facile de trouver un pays de résidence plus désirable — Si les parties requérantes n'ont plus de motif raisonnable de craindre d'être persécutées dans leur pays d'origine, elles ne sauraient se plaindre d'être traitées injustement si leurs revendications du statut de réfugié sont rejetées — La possibilité que le retard à tenir l'audience d'un réfugié donne lieu à une réparation fondée sur la Charte n'est pas exclue.

Droit constitutionnel — Charte des droits — Droit à la vie, la liberté et la sécurité de la personne — Les revendications du statut de réfugié ont été jugées sans minimum de fondement à la suite d'un laps de temps extraordinaire avant que soit rendue la décision du premier palier d'audience — Les parties requérantes auraient probablement satisfait au critère du minimum de fondement si leur audition avait eu lieu plus rapidement — Le retard abusif à procéder au traitement des revendications porte-t-il atteinte au droit à la justice fondamentale et équivaut-il à un traitement cruel et inusité? — Les demandeurs du statut de réfugié ne jouissent pas des droits

land — Possibility delay in processing refugee claim could give rise to Charter remedy not excluded.

These were applications under *Federal Court Act*, section 28 against a first stage Tribunal's decision finding applicants not to have a credible basis to their refugee status claim. The three applicants, all Fijian nationals of Indian ethnic origin, fled their country in 1987 due to the political situation then prevailing and entered Canada towards the end of that year. Their claims for refugee status having been rejected almost three years later, they alleged that the unreasonable delay in the processing of such claims breached their rights to fundamental justice under the *Canadian Charter of Rights and Freedoms*, section 7 and amounted to cruel and unusual treatment under section 12. The issue is whether the considerable length of time between the original formulation of the applicants' refugee claims and the first stage or screening decision can be a source of remedy for them.

Held, the applications should be dismissed.

The applicants cannot benefit from the *Immigration Act* since it does not set a fixed time frame within which a credible basis hearing must be held. The process should, nevertheless, be as expeditious as possible. The recent *Immigration Act* amendments were intended to streamline the refugee determination process, facilitating access for genuine claimants while quickly rejecting claims that were false. Even where the statute does set out times, failure by a tribunal to accomplish a duty within a legislated time span will generally have the effect of forcing it to remedy the defect. Only in exceptional circumstances would it result in the out of time decision being found a nullity. In the instant case, nullifying the untimely decisions would be of no help to the applicants.

The applicants' assertion, that delay in the determination of their claims has resulted in a breach of Charter rights, met two insuperable obstacles. In the first place, they were not in the same legal position as an accused person and did not enjoy the specific protection afforded by Charter, paragraph 11(*b*). The specific dispositions of section 11 are only particular applications of the principles of fundamental justice enshrined in section 7: *R. v. Askov*, [1990] 2 S.R.C. 1199. The applicants were neither charged nor claimed against by the state; rather, they were asserting claims against the state which has no obligation of proving anything against them. It was the applicants who had to prove, as a threshold test, that they had a credible basis to their claims. Unlike an accused person, they

que la Charte reconnaît aux accusés — Les demandeurs doivent satisfaire au critère du minimum de fondement — Il n'y a pas réparation fondée sur la Charte en l'absence de préjudice — Aucun préjudice n'est causé aux parties requérantes si elles n'ont plus raison de craindre d'être persécutées dans leur pays — La possibilité que le retard apporté au traitement de la revendication du statut de réfugié puisse donner lieu à une réparation fondée sur la Charte n'est pas exclue.

Les demandes, fondées sur l'article 28 de la *Loi sur la Cour fédérale*, contestent la décision par laquelle le premier palier d'audience a conclu que les revendications du statut de réfugié des parties requérantes étaient dépourvues d'un minimum de fondement. Les trois parties requérantes, toutes des ressortissantes de Fiji d'origine ethnique indienne, ont fui leur pays en 1987 en raison de la situation politique qui existait alors et elles sont entrées au Canada vers la fin de l'année en cause. Leurs revendications du statut de réfugié ayant été rejetées presque trois ans après avoir été faites, elles ont soutenu que le retard abusif à traiter ces revendications portait atteinte à leur droit à la justice fondamentale garanti par l'article 7 de la *Charte canadienne des droits et libertés*, et qu'il équivalait à un traitement cruel et inusité prévu à l'article 12. La question consiste à savoir si le laps de temps considérable entre la formulation originale de la revendication du statut de réfugié des parties requérantes et la décision du premier palier d'audience ou de la présélection peut être pour elles une source de réparation.

Arrêt: les demandes devraient être rejetées.

La *Loi sur l'Immigration* ne peut être d'aucun secours aux parties requérantes puisqu'elle n'impartit pas un délai fixe pour la tenue de l'audience sur le minimum de fondement; il entre néanmoins dans l'économie de la Loi que le processus soit aussi expéditif que possible. Les modifications récentes apportées à la *Loi sur l'immigration* visaient à alléger le processus de détermination du statut de réfugié de façon à faciliter l'accès aux véritables demandeurs de statut d'une part, et d'autre part, à décourager les abus soupçonnés en renvoyant rapidement les demandeurs non authentiques. Même lorsque la Loi contient des délais fixes, le défaut par un tribunal de s'acquitter d'une fonction dans le délai légal ne lui attire généralement que l'ordre de s'exécuter; seulement dans des circonstances exceptionnelles la décision tardive sera-t-elle considérée nulle. En l'espèce, l'annulation des décisions tardives ne serait d'aucune aide aux parties requérantes.

La prétention des parties requérantes selon laquelle le retard apporté au traitement de leurs revendications portait atteinte aux droits que leur garantit la Charte fait face à deux obstacles insurmontables. Tout d'abord, elles n'étaient pas dans la même situation juridique qu'un accusé, et elles ne jouissaient donc pas de la protection particulière offerte à l'alinéa 11*b*) de la Charte. Les dispositions particulières de l'article 11 ne sont que des applications spécifiques des principes de justice fondamentale consacrés à l'article 7: *R. c. Askov*, [1990] 2 R.C.S. 1199. Les parties requérantes n'étaient ni accusées ni poursuivies par l'État. Au contraire, c'est elles qui faisaient valoir des revendications contre l'État, qui n'a pas l'obligation de prouver quoi que ce soit contre elles. Ce sont ces dernières qui étaient tenues de satisfaire au critère préliminaire applicable au minimum de fondement de leurs revendications. Contrairement à l'accusé,

enjoyed no presumption in their favour and could never attain refugee status unless they satisfied that test.

The second obstacle of the applicants' assertion is that a delay in the resolution of their refugee status claims would not necessarily be unfair to them. Any claim of a Charter breach based on delay must depend on the claimant having been prejudiced. The purpose of the refugee system is not to provide an easy means for immigrants to find a more desirable country of residence but rather to furnish a safe haven for those fearing persecution in their homeland. Accordingly, the justice of the matter was not impacted upon by the fact that applicants may have passed the credible basis test had it been held promptly. If they no longer have reason to fear persecution in their country of origin, they cannot complain of unjust treatment in that their claims to refugee status have been denied. Even in criminal cases, a court is not justified, by the mere passage of time, to find that there has been a denial of justice without taking all the other circumstances into account. In the present case, there is no indication, either by evidence or inference from the circumstances, that the applicants have suffered prejudice or unfairness because of the delay, or that they have suffered from cruel or unusual treatment at the hands of Canadian authorities. The possibility that delay in the conduct of a refugee hearing could give rise to a Charter remedy should not, however, be excluded.

les parties requérantes ne jouissaient d'aucune présomption en leur faveur et elles ne pouvaient jamais obtenir le statut de réfugié à moins de satisfaire au critère applicable.

Le second obstacle aux prétentions des parties requérantes tient à ce que le retard apporté à l'audition de leurs revendications du statut de réfugié n'est pas nécessairement injuste à leur égard. Toute prétention à la violation de la Charte fondée sur le retard doit dépendre de la preuve d'un préjudice. L'objet du système applicable aux réfugiés n'est pas de fournir aux immigrants un moyen facile de trouver un pays de résidence plus désirable, mais plutôt d'offrir un abri sûr à ceux qui craignent avec raison d'être persécutés dans leur pays d'origine. En conséquence, bien que les parties requérantes eussent probablement satisfait au critère du minimum de fondement si leur audition avait eu lieu peu après leur arrivée, cela n'a aucune incidence sur le caractère équitable de la question. Si la situation dans le pays d'origine des parties requérantes ne soulève plus une crainte raisonnable de persécution, celles-ci ne sauraient se plaindre d'être traitées injustement si leurs revendications du statut de réfugié sont rejetées. Même dans les affaires criminelles, le simple temps écoulé ne justifie pas un tribunal de conclure à un déni de justice sans tenir compte de tous les autres faits. En l'espèce, aucun élément de preuve ni quelqu'inférence tirée des faits n'indiquent que les parties ont subi une injustice ou un préjudice attribuable au retard, ni qu'elles ont reçu un traitement cruel ou inusité aux mains des autorités canadiennes. Il ne faut toutefois pas exclure la possibilité que le retard à tenir l'audience d'un réfugié puisse donner lieu à une réparation fondée sur la Charte.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 11(*b*), 12.
Federal Court Act, R.S.C., 1985, c. F-7, s. 28.
Immigration Act, R.S.C., 1985, c. I-2.

LOIS ET RÈGLEMENTS

Charte canadienne des droits et libertés, qui constitue la Partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44], art. 7, 11*b*), 12.
Loi sur la Cour fédérale, L.R.C. (1985), chap. F-7, art. 28.
Loi sur l'immigration, L.R.C. (1985), chap. I-2.

CASES JUDICIALLY CONSIDERED

FOLLOWED:

R. v. Askov, [1990] 2 S.C.R. 1199; (1990), 75 O.R. (2d) 673; 74 D.L.R. (4th) 355; 59 C.C.C. (3d) 449; 79 C.R. (3d) 273; 49 C.R.R. 1; 42 O.A.C. 81; *W.K.L. v. Canada*, 21616, judgment dated 16/5/91, S.C.C., not yet reported.

REFERRED TO:

Misra v. College of Physicians & Surgeons of Saskatchewan (1988), 52 D.L.R. (4th) 477; [1988] 5 W.W.R. 333 (Sask. C.A.); *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143; [1989] 5 W.W.R. 1 (Sask. C.A.); *Mileva v. Canada (Minister of Employment and Immigration)*, A-726-90, Pratte, Desjardins and Marceau JJ.A., judgment dated 25/2/91, F.C.A., not yet reported; *Canada (Minister of Employment and Immigration) v. Paszkowska*, A-724-90,

JURISPRUDENCE

DÉCISIONS SUIVIES:

R. c. Askov, [1990] 2 R.C.S. 1199; (1990), 75 O.R. (2d) 673; 74 D.L.R. (4th) 355; 59 C.C.C. (3d) 449; 79 C.R. (3d) 273; 49 C.R.R. 1; 42 O.A.C. 81; *W.K.L. c. Canada*, 21616, jugement en date du 16-5-91, C.S.C., encore inédit.

DÉCISIONS CITÉES:

Misra v. College of Physicians & Surgeons of Saskatchewan (1988), 52 D.L.R. (4th) 477; [1988] 5 W.W.R. 333 (C.A. Sask.); *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143; [1989] 5 W.W.R. 1 (C.A. Sask.); *Mileva c. Canada (Ministre de l'Emploi et de l'Immigration)*, A-726-90, juges Pratte, Desjardins et Marceau, J.C.A., jugement en date du 25-2-91, C.A.F., encore inédit; *Canada (Ministre de l'Emploi et de l'Immigration) c. Paszkowska*,

Hugessen J.A., judgment dated 16/4/91, F.C.A., not yet reported.

AUTHORS CITED

Canada. *House of Commons Debates*, vol. IX, 1st Sess., 33rd Parl., 35 Eliz. II, 1986, pp. 13482-13483.
Canada. *House of Commons Debates*, vol. XIII, 2nd Sess., 33rd Parl., 37 Eliz. II, 1988, p. 16095.

COUNSEL:

Andriy J. Semotiuk and *Linda Long* for applicants.
Kirk Lambrecht for respondent.

SOLICITORS:

Andriy J. Semotiuk, Edmonton, for applicants.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

HUGESSEN J.A.: These three section 28 applications of the *Federal Court Act* [R.S.C., 1985, c. F-7] were argued together. They raise only one serious point.

The three applicants are all Fijian nationals of Indian ethnic origin. All three fled their country at the time of the coups and related disturbances there in 1987. They claimed refugee status in Canada. They were found by a first stage Tribunal not to have a credible basis for their claims. The delays between their first entry into Canada claiming refugee status and the decision of the first stage Tribunal varied from just over two and a half years to just under three years.[1]

[1] Mr. Akthar entered Canada December 13, 1987 and was found not to have a credible basis to his claim July 17, 1990. Mr. Hussein entered Canada November 5, 1987 and was found not to have a credible basis to his claim on July 17, 1990. Mr. Azad entered Canada September 6, 1987 and was found not to have a credible basis to his claim on August 8, 1990.

A-724-90, juge Hugessen, J.C.A., jugement en date du 16-4-91, C.A.F., encore inédit.

DOCTRINE

Canada. *Débats de la Chambre des communes*, vol. IX, 1re sess., 33e Lég., 35 Eliz. II, 1986, p. 13482 et 13483.
Canada. *Débats de la Chambre des communes*, vol. XIII, 2e sess., 33e Lég., 37 Eliz. II, 1988, p. 16095.

AVOCATS:

Andriy J. Semotiuk et *Linda Long* pour les requérants.
Kirk Lambrecht pour l'intimé.

PROCUREURS:

Andriy J. Semotiuk, Edmonton, pour les requérants.
Le sous-procureur général du Canada pour l'intimé.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE HUGESSEN, J.C.A.: Ces trois demandes fondées sur l'article 28 de la *Loi sur la Cour fédérale* [L.R.C. (1985), chap. F-7] ont été plaidées ensemble. Elles ne soulèvent qu'un seul point sérieux.

Les trois parties requérantes sont toutes des ressortissantes de Fiji d'origine ethnique indienne. Toutes trois ont fui leur pays au moment des coups d'État et des troubles connexes qui s'y sont produits en 1987. Elles ont revendiqué le statut de réfugié au Canada. Le premier palier d'audience a conclu que leurs revendications étaient dépourvues d'un minimum de fondement. Le temps écoulé entre leur première entrée au Canada alors qu'elles ont revendiqué le statut de réfugié et la décision du premier palier d'audience a varié entre juste un peu plus de deux ans et demi et un peu moins de trois ans[1].

[1] M. Akthar est entré au Canada le 13 décembre 1987 et sa revendication a été considérée, le 17 juillet 1990, comme n'ayant pas un minimum de fondement. M. Hussein est entré au Canada le 5 novembre 1987 et sa revendication a été jugée, le 17 juillet 1990, comme étant dépourvue du minimum de fondement. M. Azad est entré au Canada le 6 septembre 1987 et sa revendication a été considérée, le 8 août 1990, comme ne possédant pas le minimum de fondement.

The question which arises for determination is whether this quite extraordinary length of time between the original formulation of a refugee claim and the "first stage" or "screening" decision can be the source of any remedy for the present applicants. After anxious consideration I have concluded that it cannot, at least in the circumstances of the present case.

In the first place, it seems evident that the *Immigration Act* [R.S.C., 1985, c. I-2] itself can provide no succour to the applicants. While the Act does not set a fixed time frame within which a credible basis hearing must be held, I am satisfied that the legislative scheme envisages that the process should be as expeditious as possible. The announced purpose of the amendments to the *Immigration Act* was to streamline and update the refugee determination process so as to facilitate access for genuine claimants while at the same time deterring perceived abuses by quickly turning back those claimants who were not genuine.

In introducing the amendments at second reading the Minister of Employment and Immigration, the Honourable Barbara McDougall, stated as follows:

[*Translation*]

. . . .

A more efficient refugee determination system, with greater emphasis on fairness and due process, can only serve to help those in genuine need of our protection and those who play by the rules.

[*English*]

. . . We want to be able to deal with those who really need our protection as quickly and humanely as possible. The Government believes that Bill C-55, in concert with the control initiatives of Bill C-84, can achieve the stable, fair and efficient system refugees and Canadians clearly deserve.[2] [Emphasis added.]

. . . .

At an earlier stage the Minister of State for Immigration, the Honourable Walter McLean, had said:

[2] Canada. *House of Commons Debates*, 2nd Sess., 33rd Parl., (June 3, 1988), at p. 16095.

La question qui doit être déterminée consiste à savoir si ce laps de temps vraiment extraordinaire entre la formulation originale de la revendication du statut de réfugié et la décision du «premier palier d'audience» ou de la «présélection» peut être, pour les présentes parties requérantes, une source de réparation. Après m'être anxieusement interrogé, j'ai conclu que ce n'était pas le cas, tout au moins dans les circonstances de l'espèce.

Tout d'abord, il semble évident que la *Loi sur l'immigration* [L.R.C. (1985), chap. I-2] elle-même ne peut être d'aucun secours aux parties requérantes. Bien que la Loi n'impartisse pas un délai fixe pour la tenue de l'audience sur le minimum de fondement, je suis convaincu qu'il entre dans l'économie de la Loi que le processus soit aussi expéditif que possible. L'objectif déclaré des modifications apportées à la *Loi sur l'immigration* était d'une part, d'alléger et de moderniser le processus de détermination du statut de réfugié de façon à faciliter l'accès aux véritables demandeurs de statut et d'autre part, de décourager les abus soupçonnés en renvoyant rapidement les demandeurs non authentiques.

En présentant les modifications en seconde lecture, le ministre de l'Emploi et de l'Immigration, l'honorable Barbara McDougall, a déclaré ce qui suit:

[FRANÇAIS]

. . . .

Un processus de reconnaissance du statut de réfugié plus efficace, à l'intérieur duquel l'accent sera mis davantage sur l'équité et sur la procédure légale, ne peut qu'être favorable aux personnes qui ont un véritable besoin de protection et aux personnes qui respectent les règles établies.

[TRADUCTION]

. . . Nous voulons être en mesure de traiter avec ceux qui ont réellement besoin de notre protection aussi rapidement et humainement que possible. Le gouvernement est d'avis que le projet de loi C-55, combiné aux initiatives de contrôle que prévoit le projet de loi C-84, contient toutes les dispositions voulues pour assurer la mise en œuvre du processus stable, équitable et efficace auquel les Canadiens—et les réfugiés—sont manifestement en droit de s'attendre[2]. [C'est moi qui souligne.]

À une étape antérieure, le ministre d'État à l'Immigration, l'honorable Walter McLean, a dit ce qui suit:

[2] Canada. *Débats de la Chambre des communes*, 2e sess., 33e Lég., (3 juin 1988), à la p. 16095.

[*English*]

There is agreement that claims to refugee status should be treated fairly, humanely and expeditiously.

. . .

In formulating our proposals, we have been mindful of our international legal and moral obligations as a signatory to the United Nations convention as well as Canadian standards of justice as set out in the Canadian Bill of Rights and the Charter of Rights and Freedoms. We have taken a cumbersome and elaborate system, an outdated system which caused tragic delays for genuine refugees and months of uncertainty for others, and we have streamlined it. I believe we have made it essentially more fair and more efficient[3]. [Emphasis added.]

Whatever the intention of the scheme, however, and even if the Act did contain a fixed timetable for the completion of the first stage hearings, it is difficult to know how this could be of any comfort to the applicants. As a general rule, failure by a tribunal to accomplish a duty within a legislated time span will usually result in no more than an order that it remedy the defect and get on with the job; at most, and in extraordinary circumstances, it may result in the out of time decision being found to be a nullity.

Here, the applicants have had their decisions, albeit very late. It is quite obvious that nullifying the untimely decisions can be of no help whatsoever to them; that would only put them back where they started. The result would be to make the delays even longer without necessarily providing the applicants with a favourable outcome to their refugee claims.

This brings me to the principle ground urged by counsel for the applicants in support of the section 28 applications, namely the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. It is said that the unreasonable delay in the processing of the applicants' claims were in breach of their rights to fundamental justice under section 7 and amounted to cruel and unusual treatment under section 12.

[3] Canada. *House of Commons Debates*, 1st Sess., 33rd Parl., (May 21, 1986), at pp. 13482-13483.

[TRADUCTION]

Toute le monde reconnaît que les demandes de statut de réfugié doivent être examinées équitablement, humainement et rapidement.

. . .

Dans la formulation de nos propositions, nous n'avons pas perdu de vue nos obligations internationales, légales et morales, en tant que signataires de la convention des Nations-Unies, ni les normes canadiennes de justice fixées par la Déclaration canadienne des droits et la Charte des droits et libertés. Nous avons pris un régime lourd et alambiqué, un régime désuet, qui entraînait des retards tragiques pour d'authentiques réfugiés et des mois d'incertitude pour d'autres, et nous l'avons affiné. Je pense qu'en substance nous en avons fait quelque chose de plus juste et de plus efficace[3]. [C'est moi qui souligne.]

Quelle que soit l'intention du législateur cependant, et même si la Loi contenait un délai fixe pour l'achèvement des audiences au premier palier, il est difficile de savoir comment cela pourrait apporter quelque réconfort aux parties requérantes. Règle générale, le défaut par un tribunal de s'acquitter d'une fonction dans le délai légal ne lui attire rien de plus que l'ordre de s'exécuter; tout au plus, et dans des circonstances exceptionnelles, la décision tardive sera-t-elle déclarée nulle.

En l'espèce, les parties requérantes ont obtenu une décision, bien que tardive. Il est évident que l'annulation des décisions tardives ne saurait leur être d'aucune aide; cela ne ferait que les replacer au point de départ. Cette mesure aurait pour conséquence de prolonger les retards sans nécessairement donner une heureuse issue aux revendications du statut de réfugié des parties requérantes.

Cela m'amène au principal moyen invoqué par l'avocat des parties requérantes à l'appui des demandes fondées sur l'article 28, à savoir la *Charte canadienne des droits et libertés* [qui constitue la Partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, chap. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44]]. On soutient que le retard abusif apporté au traitement des revendications des parties requérantes portait atteinte à leur droit à la justice fondamentale garanti par l'article 7 et équivalait à un traitement cruel et inusité en vertu de l'article 12.

[3] Canada. *Débats de la Chambre des communes*, 1re sess., 33e Lég., (21 mai 1986), aux p. 13482 et 13483.

I am quite prepared for the purpose of this discussion to assume that the applicants' rights to life, liberty and security of the person are put in issue by the refugee determination process, and that a right to a hearing within a reasonable time is an aspect of fundamental justice.

I might even be prepared to concede that unreasonable restrictions, bureaucratic hassles and interminable delays in the processing of claims touching the very fundamentals of human existence, might, in some circumstances, be found to constitute cruel or unusual treatment.

There are, however, as it seems to me, two insuperable obstacles to an acceptance of the applicants' assertion that delay in the determination of their claims has resulted in a breach of Charter rights.

In the first place, the applicants are not at all in the same legal position as an accused person. This, of course means that they do not enjoy the specific protection afforded by paragraph 11(*b*) of the Charter. That in itself is not conclusive for it is well accepted that the specific dispositions of section 11 are only particular applications of the principles of fundamental justice enshrined in section 7. In Askov,[4] Cory J., speaking for a majority of the Supreme Court, said [at page 1219]:

. . .

s. 11(*b*) explicitly focusses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the *Charter*. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

[4] *R. v. Askov*, [1990] 2 S.C.R. 1199.

Je suis parfaitement disposé, aux fins de la discussion, à tenir pour acquis que les droits des parties requérantes à la vie, à la liberté et à la sécurité de leur personne sont mis en cause par le processus de détermination du statut de réfugié, et que le droit à une audition dans un délai raisonnable est un aspect de la justice fondamentale.

Je pourrais même être disposé à concéder que des restrictions abusives, des tracasseries administratives et des retards interminables à traiter des revendications qui touchent aux principes essentiels de la vie humaine pourraient, dans certaines circonstances, être assimilés à un traitement cruel ou inusité.

Cependant deux obstacles insurmontables s'opposent, me semble-t-il, à la prétention des parties requérantes que le retard apporté au traitement de leurs revendications constitue une violation des droits que leur confère la Charte.

Tout d'abord, les parties requérantes ne sont pas du tout dans la même situation juridique qu'un accusé. Cela signifie naturellement qu'elles ne jouissent pas de la protection particulière offerte à l'alinéa 11*b*) de la Charte. Ce qui n'est pas, en soi, concluant, car il est reconnu que les dispositions particulières de l'article 11 ne sont que des applications spécifiques des principes de justice fondamentale consacrés à l'article 7. Dans l'arrêt *Askov*[4], le juge Cory, qui s'exprimait pour une majorité de la Cour suprême, a dit ce qui suit [à la page 1219]:

. . .

l'al. 11*b*) vise explicitement le droit individuel à la liberté et à la sécurité de la personne. Comme les autres droits garantis par l'art. 11, cet alinéa vise principalement un aspect particulier de la justice fondamentale garantie en vertu de l'art. 7 de la *Charte*. Il est difficile d'imaginer pire frustration pour des personnes innocentes qui sont accusées d'une infraction que celle d'être privées pendant un temps démesurément long de la possibilité de prouver leur innocence, et cela, en raison de délais excessifs à leur faire subir leur procès. L'attente d'un procès doit être un supplice pour les accusés et leur famille immédiate. Il existe un précepte fondamental de notre droit criminel selon lequel toute personne est présumée innocente jusqu'à preuve de sa culpabilité. Il s'ensuit qu'il est tout aussi fondamental qu'un accusé, présumé innocent, ait la possibilité de se défendre de l'accusation portée contre lui, de se disculper et de rétablir sa réputation le plus tôt possible.

[4] *R. c. Askov*, [1990] 2 R.C.S. 1199.

This passage, in my view, also serves to point up the clear distinction in law between the position of the present applicants and a person charged with a criminal offense. While it may well be that section 7 includes the right to have the state conduct proceedings other than criminal prosecutions against the citizen within a reasonable delay[5] there can be no such analogy between these applicants and persons accused of crimes.

The applicants are not charged or claimed against by the state in any way. On the contrary they are asserting claims against the state. It is not the state which has any burden of proving anything against the applicants; rather it is the applicants who must satisfy the very low threshold test that they have a credible basis to their claims to be refugees. Finally and most importantly, the applicants enjoy no presumption in their favour in the way that an accused person does. If no disposition is ever made of his case an accused is and remains innocent; a refugee claimant in the same circumstances never attains refugee status.

In *Askov*, *supra*, a majority of the Supreme Court recognized that the interests served by paragraph 11(*b*) of the Charter were not only individual but societal as well. That must equally be the case, one would think, where one is dealing with claims against the state: both claimant and the state may have an interest in having a hearing within a reasonable delay. But what is reasonable must of necessity vary from case to case. Since either or both parties may have a perfectly legitimate interest in putting off the hearing for a greater or less period of time it would seem to me to be impossible to affirm that any particular delay in conducting the hearing is always unreasonable, regardless of the circumstances. From the claimant's point of view, some kinds of claims against the state may even improve or mature with the passage of an unreasonable length of time. In the

[5] See for example *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.) and *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.).

Cet extrait, à mon sens, fait aussi ressortir la claire distinction en droit entre la situation des présentes parties requérantes et celle d'une personne accusée d'une infraction criminelle. Même s'il se peut fort bien que l'article 7 comporte le droit d'exiger que l'État prenne contre un citoyen des procédures qui ne sont pas des poursuites criminelles dans un délai raisonnable[5], il ne saurait y avoir aucune analogie de ce genre entre ces parties requérantes et des personnes accusées d'actes criminels.

Les parties requérantes ne sont ni accusées ni poursuivies par l'État de quelque façon que ce soit. Au contraire, c'est elles qui font valoir des revendications contre l'État. Ce n'est pas l'État qui a l'obligation de prouver quoi que ce soit contre les parties requérantes; ce sont plutôt ces dernières qui sont tenues de satisfaire au critère préliminaire peu exigeant applicable au minimum de fondement de leurs prétentions au statut de réfugié. En dernier lieu et plus important encore, les parties requérantes ne jouissent d'aucune présomption en leur faveur, comme c'est le cas pour les accusés. En effet, l'accusé dont l'affaire n'est jamais jugée est et demeure innocent; le demandeur du statut de réfugié, dans les mêmes circonstances, n'atteint jamais le statut de réfugié.

Dans l'arrêt *Askov*, précité, une majorité de la Cour suprême a reconnu que les intérêts servis par l'alinéa 11*b*) de la Charte n'étaient pas uniquement individuels mais sociaux également. On peut croire qu'il doit en être de même pour les revendications contre l'État: la partie requérante aussi bien que l'État peuvent être intéressés à la tenue d'une audience dans un délai raisonnable. Mais ce qui est raisonnable doit forcément varier d'un cas à l'autre. Puisque l'une ou l'autre des parties, ou les deux, peuvent avoir un intérêt parfaitement légitime à retarder l'audience pendant une période plus ou moins longue, il me semblerait impossible d'affirmer qu'un retard particulier à tenir une audience est toujours abusif, indépendamment des circonstances. Du point de vue de la partie requérante, certaines sortes d'actions contre l'État peuvent même s'améliorer ou se parfaire à la suite

[5] Voir par exemple l'arrêt *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, (C.A. Sask.) et *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.).

particular case of refugee claimants it is a commonplace that the paralysis of the former system, with its resulting backlogs, was only resolved by the granting of periodic amnesties and the admission into Canada of persons whose claims to refugee status were doubtful in the extreme.

Since in my view one cannot draw a proper analogy in law between the position of the applicants and persons charged with offenses, any claims to Charter breach based on delay must depend on a showing of prejudice by the claimant: that the delay was for a person in his situation unreasonable. This is the second obstacle faced by these applicants for it is my further view that there is nothing in the circumstances or in the evidence in the present cases to support their claims.

To put the matter another way, a delayed hearing for the resolution of a claim to refugee status is not necessarily an unfair or an unjust one for the claimant. While it is the case that each of the present applicants would probably have passed the credible basis test had his hearing been held shortly after his arrival (and the tribunal so indicated in each case) that has no impact on the justice of the matter. The purpose of the refugee system both in international and domestic law is not to provide an easy means for immigrants to find a new and more desirable country of residence; it is to furnish a safe haven to those who rightly fear they will be persecuted in their country of origin. Thus, if as was found to be the case here, the situation in the applicants' country of origin has now returned to one where it is no longer reasonable to fear persecution, the applicants can have no complaints of unjust treatment if their claims to refugee status are denied.[6] The shoe could, of course, have equally well been on the other foot: the concept of a *réfugié sur place* is well known and persons who find themselves in Canada, at a time when events in their country of origin give rise to a hitherto

[6] See *Mileva v. Canada (Minister of Employment and Immigration)* (February 25, 1991) A-726-90 (F.C.A.) and *Canada (Minister of Employment and Immigration) v. Paszkowska* (April 16, 1991) A-724-90 (F.C.A.).

d'un laps de temps démesurément long. Dans le cas particulier des demandeurs du statut de réfugié, il est bien connu que la paralysie de l'ancien système, avec ses arriérés de travail inévitables, ne trouvait une solution que dans les amnisties périodiques et l'admission au Canada de personnes dont les revendications du statut de réfugié étaient des plus douteuses.

Comme j'estime qu'on ne peut correctement faire une analogie en droit entre la situation des parties requérantes et celle des personnes accusées d'infractions, toute prétention à la violation de la Charte fondée sur le retard doit dépendre de la preuve d'un préjudice causé au demandeur, à savoir que le retard était abusif pour une personne dans sa situation. C'est là le second obstacle auquel font face ces parties requérantes, car je crois en outre que ni les circonstances ni la preuve dans les présentes affaires n'appuient leurs revendications.

Pour dire les choses différemment, le retard apporté à l'audition d'une revendication du statut de réfugié ne rend pas nécessairement cette audition inéquitable ou injuste pour le demandeur. Bien qu'effectivement la revendication de chacune des parties requérantes eût probablement satisfait au critère du minimum de fondement si leur audition avait eu lieu peu après leur arrivée (et le tribunal l'a laissé entendre dans chaque cas), cela n'a aucune incidence sur le caractère équitable de la question. L'objet du système applicable aux réfugiés, tant en droit international qu'en droit interne, n'est pas de fournir aux immigrants un moyen facile de trouver un pays de résidence nouveau et plus désirable, mais plutôt d'offrir un abri sûr à ceux qui craignent avec raison d'être persécutés dans leur pays d'origine. Donc, si comme on l'a conclu en l'espèce, la situation dans le pays d'origine des parties requérantes ne soulève plus une crainte raisonnable de persécution, celles-ci ne sauraient se plaindre d'être traitées injustement si leurs revendications du statut de réfugié sont rejetées[6]. Évidemment l'inverse peut tout aussi bien se produire: le concept du *réfugié sur*

[6] Voir *Mileva c. Canada (Ministre de l'Emploi et de l'Immigration)* (25 février 1991) A-726-90 (C.A.F.) et *Canada (Ministre de l'Emploi et de l'Immigration) c. Paszkowska*, (16 avril 1991) A-724-90 (C.A.F.).

unfounded fear of persecution, may claim and be accepted as refugees here.

Even in criminal cases it is now clear that the mere fact of the passage of time will not justify a court in finding that there has been a denial of justice without taking all the other circumstances into account. In the very recent case of *W.K.L. v. Canada*[7] Stevenson J., speaking for a unanimous Supreme Court, said:

> Many of the cases which have considered the issue have held that "mere delay" or "delay in itself" will never result in the denial of an individual's rights. This language is imprecise. Delay can, clearly, be the sole "wrong" upon which an individual rests the claim that his or her rights have been denied. The question is whether an accused can rely solely on the passage of time which is apparent on the face of the indictment as establishing a violation of s. 7 or s. 11(*d*)

> Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp.1040-41):

> Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the *Criminal Code*, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward in prosecution and may be in a position, accordingly to assess the weight of some of the evidence.

> Does the *Charter* now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not.

> Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare

[7] Court file number 21616, judgment dated May 16, 1991.

place est bien connu, et les personnes qui se trouvent au Canada au moment où des événements dans leur pays d'origine donnent lieu à une crainte de persécution jusque-là non fondée peuvent faire une revendication et être acceptées ici comme réfugiés.

Même dans les affaires criminelles, il est maintenant clair que le simple temps écoulé ne justifie pas un tribunal de conclure à un déni de justice sans tenir compte de tous les autres faits. Dans l'arrêt très récent *W.K.L. c. Canada*[7], le juge Stevenson, qui s'exprimait pour une Cour suprême unanime, a dit ce qui suit:

> Un grand nombre des arrêts qui traitent de la question affirment que le «simple retard» ou le «retard comme tel» n'entraîne jamais d'atteinte aux droits d'un particulier. Ces expressions sont imprécises. Le retard peut clairement être le seul «tort» sur lequel se fonde une personne pour prétendre qu'il y a eu atteinte à ses droits. La question est de savoir si un accusé peut s'appuyer uniquement sur le temps écoulé, qui ressort de l'acte d'accusation, pour prouver qu'il y a violation de l'art. 7 ou de l'al. 11*d*).

> Le retard à accuser et à poursuivre une personne ne peut, en l'absence d'autres facteurs, justifier l'arrêt des procédures au motif qu'elles constitueraient un abus de procédure selon la common law. Dans l'arrêt *Rourke c. La Reine*, [1978] 1 R.C.S. 1021, le juge en chef Laskin (avec l'accord de la majorité sur ce point) a dit ce qui suit, aux p. 1040 et 1041:

> En l'absence de toute prétention que le retard mis à arrêter l'accusé avait quelque but caché, les tribunaux ne sont pas en mesure de dire à la police qu'elle n'a pas enquêté avec assez de diligence et ensuite, comme sanction, de suspendre les procédures quand la poursuite est engagée. Le délai qui s'écoule entre la perpétration d'une infraction et la mise en accusation d'un prévenu à la suite de son arrestation ne peut pas être contrôlé par les tribunaux en imposant des normes strictes aux enquêtes. Preuves et témoins peuvent disparaître à brève comme à longue échéance; de même, on peut avoir à rechercher le prévenu plus ou moins longtemps. Sous réserve des contrôles prescrits par le *Code criminel*, les poursuites engagées longtemps après la perpétration alléguée d'une infraction doivent suivre leur cours et être traitées par les tribunaux selon la preuve fournie, preuve dont le bien-fondé et la crédibilité doivent être évalués par les juges. La Cour peut demander une explication sur tout retard fâcheux de la poursuite et être ainsi en mesure d'évaluer le poids de certains éléments de la preuve.

> La *Charte* met-elle maintenant les accusés à l'abri des poursuites simplement en raison du délai écoulé entre la perpétration de l'infraction et la mise en accusation? À mon sens, tel n'est pas le cas.

> Mettre fin aux procédures simplement en raison du temps écoulé équivaudrait à imposer une prescription de création judiciaire à l'égard d'une infraction criminelle. Au Canada,

[7] Numéro du greffe 21616, jugement en date du 16 mai 1991.

circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the *Charter*.

Section 7 and s. 11(*d*) of the *Charter* protect, among other things, an individual's right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in *Mills v. the Queen*, *supra*, at p. 945, are apposite:

> Pre-charge delay is relevant under ss.7 and 11(*d*) because it is not the *length* of the delay which matters but rather the *effect* of that delay upon the fairness of the trial. [Emphasis added.]

Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

In my view any claim in a non-criminal case to Charter breach based on delay requires to be supported either by evidence or at the very least by some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay. There is no such support to be found in the present cases.

In particular there is no indication that the applicants suffered any procedural unfairness due to the delay in holding the hearings. Indeed, the contrary appears to be the case. In most refugee hearings, whether at the credible basis or at the second stage, the claimant is likely to be the only witness in support of his claim. Here counsel for the applicants was able to use the time available to gather evidence in Fiji and elsewhere; that evidence was produced at the hearing and relied on by the applicants.

To the extent that the Charter claim rests on section 7, there is also no indication in these records as to the reason for the long delay or as to whether any part of it may be due to the applicants themselves. There is equally no indication that any of the applicants, at any time, took any steps with a view to having the matters brought on in a more timely fashion.

sauf dans de rares circonstances, il n'existe pas de prescription en matière criminelle. Les observations du juge en chef Laskin dans l'arrêt *Rourke* s'appliquent aussi sous l'empire de la *Charte*.

L'article 7 et l'al. 11*d*) de la *Charte* garantissent notamment le droit de l'inculpé à un procès équitable. Cette équité n'est toutefois pas automatiquement compromise même par un long délai avant le dépôt de l'accusation. En fait, un retard peut jouer en faveur de l'accusé, puisque des témoins à charge peuvent oublier ou disparaître. Les observations du juge Lamer (maintenant Juge en chef) dans l'arrêt *Mills c. La Reine*, précité, à la p. 945, sont pertinentes:

> Le délai antérieur à l'inculpation est pertinent en vertu de l'art. 7 et de l'al. 11*d*), car ce n'est pas la *durée* du délai qui importe, mais plutôt *l'effet* de ce délai sur l'équité du procès. [Je souligne.]

Par conséquent, les tribunaux ne peuvent pas apprécier l'équité d'un procès donné sans prendre en considération les circonstances propres à l'espèce. Il n'y a pas violation des droits de l'accusé simplement en raison du long délai qui ressort de l'acte d'accusation même.

À mon avis, dans les affaires non criminelles, toute prétention à la violation de la Charte fondée sur un retard doit s'appuyer sur la preuve, ou à tout le moins sur quelque inférence tirée des circonstances environnantes, que la partie demanderesse a réellement subi un préjudice ou une injustice imputable au retard. Les présentes affaires n'offrent aucune preuve de ce genre.

Plus particulièrement, rien n'indique que les parties requérantes ont subi une injustice procédurale attribuable au retard à tenir les audiences. De fait, cela semble être le contraire. En effet, dans la plupart des auditions des revendications des réfugiés, que ce soit au palier du minimum de fondement ou au second palier, le demandeur de statut est susceptible d'être le seul témoin à l'appui de sa revendication. Or, en l'espèce, l'avocat des parties requérantes a été capable d'employer le temps dont il disposait pour réunir des éléments de preuve à Fiji et ailleurs; ces éléments de preuve ont été produits à l'audience et les parties requérantes les ont invoqués.

Dans la mesure où la revendication fondée sur la Charte s'appuie sur l'article 7, ces dossiers n'offrent non plus aucun indice du motif du long retard apporté ni ne permettent de déceler s'il peut être en partie imputé aux parties requérantes elles-mêmes. Rien non plus n'indique qu'aucune des parties requérantes, à quelque moment que ce soit, a pris des mesures pour que sa cause soit entendue dans un meilleur délai.

Insofar as the claim for Charter breach finds its source in section 12, there is a total lack of any evidentiary basis whatsoever. There is simply nothing upon which one could say that these applicants in particular, or refugee claimants in general, are suffering from cruel or unusual treatment at the hands of Canadian authorities.

In these circumstances and while, as indicated, I do not exclude the possibility of delay in the conduct of a refugee hearing giving rise to a Charter remedy, this is not such a case.

I would dismiss the section 28 applications.

PRATTE J.A.: I agree.

DESJARDINS J.A.: I concur.

Dans la mesure où les prétentions fondées sur la Charte s'appuient sur l'article 12, nous nous heurtons à une absence totale de preuves. Il n'existe tout simplement rien qui permet de dire que ces parties requérantes en particulier, ou les demandeurs de statut de réfugié en général, subissent un traitement cruel ou inusité aux mains des autorités canadiennes.

Bien que, comme je l'ai laissé entendre, je n'exclue pas la possibilité que le retard à tenir l'audience d'un réfugié donne lieu à une réparation fondée sur la Charte, je conclus que tel n'est pas le cas dans les circonstances de l'espèce.

Je rejetterais les demandes fondées sur l'article 28.

LE JUGE PRATTE, J.C.A.: Je souscris à ces motifs.

LE JUGE DESJARDINS, J.C.A.: Je souscris à ces motifs.

ROTH *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 582. Argued April 22, 1957.—Decided June 24, 1957.*

1. In the *Roth* case, the constitutionality of 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and Roth's conviction thereunder for mailing an obscene book and obscene circulars and advertising, are sustained. Pp. 479–494.

2. In the *Alberts* case, the constitutionality of § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale, or to advertise, material that is "obscene or indecent," and Alberts' conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them, are sustained. Pp. 479–494.

3. Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States. Pp. 481–485.

(a) In the light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. Pp. 482–483.

(b) The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. P. 484.

(c) All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Pp. 484–485.

---

*Together with No. 61, *Alberts* v. *California*, appeal from the Superior Court of California, Los Angeles County, Appellate Department, argued and decided on the same dates.

4. Since obscenity is not protected, constitutional guaranties were not violated in these cases merely because, under the trial judges' instructions to the juries, convictions could be had without proof either that the obscene material would perceptibly create a clear and present danger of antisocial conduct, or probably would induce its recipients to such conduct. *Beauharnais* v. *Illinois*, 343 U. S. 250. Pp. 485–490.

(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—*i. e.*, material having a tendency to excite lustful thoughts. P. 487.

(b) It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Pp. 487–488.

(c) The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. Pp. 488–489.

(d) In these cases, both trial courts sufficiently followed the proper standard and used the proper definition of obscenity. Pp. 489–490.

5. When applied according to the proper standard for judging obscenity, 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," does not (1) violate the freedom of speech or press guaranteed by the First Amendment, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. Pp. 491–492.

6. When applied according to the proper standard for judging obscenity, § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale or to advertise material that is "obscene or indecent," does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendmend against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. 491–492.

7. The federal obscenity statute, 18 U. S. C. § 1461, punishing the use of the mails for obscene material, is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7; and it

does not unconstitutionally encroach upon the powers reserved to the States by the Ninth and Tenth Amendments. Pp. 492–493.

8. The California obscenity statute here involved is not repugnant to Art. I, § 8, cl. 7, since it does not impose a burden upon, or interfere with, the federal postal functions—even when applied to a mail-order business. Pp. 493–494.

237 F. 2d 796, affirmed.

138 Cal. App. 2d Supp. 909, 292 P. 2d 90, affirmed.

David von G. Albrecht and *O. John Rogge* argued the cause for petitioner in No. 582. With them on the brief were *David P. Siegel, Peter Belsito* and *Murray A. Gordon.*

Stanley Fleishman argued the cause for appellant in No. 61. With him on the brief were *Sam Rosenwein* and *William B. Murrish.*

Roger D. Fisher argued the cause for the United States in No. 582. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Olney.*

Fred N. Whichello and *Clarence A. Linn,* Assistant Attorney General of California, argued the cause for appellee in No. 61. With them on the brief were *Edmund G. Brown,* Attorney General, *William B. McKesson* and *Lewis Watnick.*

Briefs of *amici curiae* urging reversal were filed in No. 582 by *Morris L. Ernst, Harriett F. Pilpel* and *Nancy F. Wechsler,* for Ernst, *Irwin Karp* and *Osmond K. Fraenkel,* for the Authors League of America, Inc., *Abe Fortas, William L. McGovern, Abe Krash* and *Maurice Rosenfield,* for the Greenleaf Publishing Co. et al., *Horace S. Manges,* for the American Book Publishers Council, Inc., and *Emanuel Redfield,* for the American Civil Liberties Union.

A. L. Wirin filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae,* in support of appellant in No. 61.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute [1] violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code [2] invade the freedoms of speech and press as they may be incorporated in

---

[1] The federal obscenity statute provided, in pertinent part:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1461.

The 1955 amendment of this statute, 69 Stat. 183, is not applicable to this case.

[2] The California Penal Code provides, in pertinent part:

"Every person who wilfully and lewdly, either:

. . . . . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or other-

the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

Other constitutional questions are: whether these statutes violate due process,[3] because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*); and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, pre-empted the regulation of the subject matter (raised in *Alberts*).

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit.[4] We granted certiorari.[5]

---

wise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . .

. . . . . .

"6. . . . is guilty of a misdemeanor. . . ." West's Cal. Penal Code Ann., 1955, § 311.

[3] In *Roth*, reliance is placed on the Due Process Clause of the Fifth Amendment, and in *Alberts*, reliance is placed upon the Due Process Clause of the Fourteenth Amendment.

[4] 237 F. 2d 796.

[5] 352 U. S. 964. Petitioner's application for bail was granted by MR. JUSTICE HARLAN in his capacity as Circuit Justice for the Second Circuit. 1 L. Ed. 2d 34, 77 Sup. Ct. 17.

Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.[6] We noted probable jurisdiction.[7]

The dispositive question is whether obscenity is utterance within the area of protected speech and press.[8] Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. *Ex parte Jackson*, 96 U. S. 727, 736–737; *United States* v. *Chase*, 135 U. S. 255, 261; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508; *Hoke* v. *United States*, 227 U. S. 308, 322; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158; *Winters* v. *New York*, 333 U. S. 507, 510; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266.[9]

---

[6] 138 Cal. App. 2d Supp. 909, 292 P. 2d 90. This is the highest state appellate court available to the appellant. Cal. Const., Art. VI, § 5; see *Edwards* v. *California*, 314 U. S. 160.

[7] 352 U. S. 962.

[8] No issue is presented in either case concerning the obscenity of the material involved.

[9] See also the following cases in which convictions under obscenity statutes have been reviewed: *Grimm* v. *United States*, 156 U. S. 604; *Rosen* v. *United States*, 161 U. S. 29; *Swearingen* v. *United States*,

The guaranties of freedom of expression [10] in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel,[11] and all of those States made either blasphemy or profanity, or both, statutory crimes.[12] As early as

---

161 U. S. 446; *Andrews* v. *United States*, 162 U. S. 420; *Price* v. *United States*, 165 U. S. 311; *Dunlop* v. *United States*, 165 U. S. 486; *Bartell* v. *United States*, 227 U. S. 427; *United States* v. *Limehouse*, 285 U. S. 424.

[10] Del. Const., 1792, Art. I, § 5; Ga. Const., 1777, Art. LXI; Md. Const., 1776, Declaration of Rights, § 38; Mass. Const., 1780, Declaration of Rights, Art. XVI; N. H. Const., 1784, Art. I, § XXII; N. C. Const., 1776, Declaration of Rights, Art. XV; Pa. Const., 1776, Declaration of Rights, Art. XII; S. C. Const., 1778, Art. XLIII; Vt. Const., 1777, Declaration of Rights, Art. XIV; Va. Bill of Rights, 1776, § 12.

[11] Act to Secure the Freedom of the Press (1804), 1 Conn. Pub. Stat. Laws 355 (1808); Del. Const., 1792, Art. I, § 5; Ga. Penal Code, Eighth Div., § VIII (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md. Public General Laws 1096 (Poe 1888); *Commonwealth* v. *Kneeland*, 37 Mass. 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 253; Act Respecting Libels (1799), N. J. Rev. Laws 411 (1800); *People* v. *Croswell*, 3 Johns. (N. Y.) 337 (1804); Act of 1803, c. 632, 2 Laws of N. C. 999 (1821); Pa. Const., 1790, Art. IX, § 7; R. I. Code of Laws (1647), Proceedings of the First General Assembly and Code of Laws 44–45 (1647); R. I. Const., 1842, Art. I, § 20; Act of 1804, 1 Laws of Vt. 366 (Tolman 1808); *Commonwealth* v. *Morris*, 1 Brock. & Hol. (Va.) 176 (1811).

[12] Act for the Punishment of Divers Capital and Other Felonies, Acts and Laws of Conn. 66, 67 (1784); Act Against Drunkenness, Blasphemy, §§ 4, 5 (1737), 1 Laws of Del. 173, 174 (1797); Act to Regulate Taverns (1786), Digest of the Laws of Ga. 512, 513 (Prince 1822); Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); General Laws and Liberties of Mass. Bay, c. XVIII, § 3 (1646), Mass. Bay Colony Charters & Laws 58 (1814); Act of 1782, c. 8, Rev. Stat. of Mass. 741, § 15 (1836); Act of 1798, c. 33, §§ 1, 3, Rev. Stat. of Mass. 741, § 16 (1836); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 252, 256; Act

1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.[13]

---

for the Punishment of Profane Cursing and Swearing (1791), N. H. Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII, IX (1798), N. J. Rev. Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 Laws of N. Y. 257, 258 (Jones & Varick 1777–1789); *People* v. *Ruggles*, 8 Johns. (N. Y.) 290 (1811); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), 1 N. C. Laws 52 (Martin Rev. 1715–1790); Act to Prevent the Grievous Sins of Cursing and Swearing (1700), II Statutes at Large of Pa. 49 (1700–1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791–1802); Act to Reform the Penal Laws, §§ 33, 34 (1798), R. I. Laws 1798, 584, 595; Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S. C. 4 (Grimké 1790); Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 332, 339 (Tolman 1808); Act, for the Punishment of Certain Inferior Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 352, 361 (Tolman 1808); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).

[13] Act Concerning Crimes and Punishments, § 69 (1821), Stat. Laws of Conn. 109 (1824); *Knowles* v. *State*, 3 Day (Conn.) 103 (1808);

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 Journals of the Continental Congress 108 (1774).

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.[14] But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for

---

Rev. Stat. of 1835, c. 130, § 10, Rev. Stat. of Mass. 740 (1836); *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821); Rev. Stat. of 1842, c. 113, § 2, Rev. Stat. of N. H. 221 (1843); Act for Suppressing Vice and Immorality, § XII (1798), N. J. Rev. Laws 329, 331 (1800); *Commonwealth* v. *Sharpless*, 2 S. & R. (Pa.) 91 (1815).

[14] *E. g.*, *United States* v. *Harriss*, 347 U. S. 612; *Breard* v. *Alexandria*, 341 U. S. 622; *Teamsters Union* v. *Hanke*, 339 U. S. 470; *Kovacs* v. *Cooper*, 336 U. S. 77; *Prince* v. *Massachusetts*, 321 U. S. 158; *Labor Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *Cox* v. *New Hampshire*, 312 U. S. 569; *Schenck* v. *United States*, 249 U. S. 47.

that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations,[15] in the obscenity laws of all of the 48 States,[16] and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.[17] This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*" (Emphasis added.)

We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish

---

[15] Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511; Treaties in Force 209 (U. S. Dept. State, October 31, 1956).

[16] Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 62, 84th Cong., 1st Sess. 49–52 (May 24, 1955).

Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N. M. Stat. Ann., 1953, §§ 14–21–3, 14–21–12.

[17] 5 Stat. 548, 566; 11 Stat. 168; 13 Stat. 504, 507; 17 Stat. 302; 17 Stat. 598; 19 Stat. 90; 25 Stat. 187, 188; 25 Stat. 496; 26 Stat. 567, 614–615; 29 Stat. 512; 33 Stat. 705; 35 Stat. 1129, 1138; 41 Stat. 1060; 46 Stat. 688; 48 Stat. 1091, 1100; 62 Stat. 768; 64 Stat. 194; 64 Stat. 451; 69 Stat. 183; 70 Stat. 699.

incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*." (Emphasis added.) In *Alberts*, the trial judge applied the test laid down in *People* v. *Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, namely, whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct,[18] or will probably induce its recipients to such conduct.[19] But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois*, *supra*, at 266:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech,

---

[18] *Schenck* v. *United States*, 249 U. S. 47. This approach is typified by the opinion of Judge Bok (written prior to this Court's opinion in *Dennis* v. *United States*, 341 U. S. 494) in *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389.

[19] *Dennis* v. *United States*, 341 U. S. 494. This approach is typified by the concurring opinion of Judge Frank in the *Roth* case, 237 F. 2d, at 801. See also Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954).

for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] The portrayal of sex, *e. g.*, in art, literature and scientific works,[21] is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems,

---

[20] *I. e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

". . . Quality of being prurient; lascivious desire or thought. . . ."

See also *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, 242, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to*. . . ." (Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10 (2) (Tent. Draft No. 6, 1957), *viz.*:

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

[21] See, *e. g.*, *United States* v. *Dennett*, 39 F. 2d 564.

this Court said in *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*" (Emphasis added.)

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.[22] Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[23] It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated

---

[22] Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 571.

[23] See note 14, *supra*.

excerpt upon particularly susceptible persons. *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360.[24] Some American courts adopted this standard [25] but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[26] The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the

---

[24] But see the instructions given to the jury by Mr. Justice Stable in *Regina* v. *Martin Secker Warburg*, [1954] 2 All Eng. 683 (C. C. C.).

[25] *United States* v. *Kennerley*, 209 F. 119; *MacFadden* v. *United States*, 165 F. 51; *United States* v. *Bennett*, 24 Fed. Cas. 1093; *United States* v. *Clarke*, 38 F. 500; *Commonwealth* v. *Buckley*, 200 Mass. 346, 86 N. E. 910.

[26] *E. g.*, *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 149 F. 2d 511; *Parmelee* v. *United States*, 72 App. D. C. 203, 113 F. 2d 729; *United States* v. *Levine*, 83 F. 2d 156; *United States* v. *Dennett*, 39 F. 2d 564; *Khan* v. *Feist, Inc.*, 70 F. Supp. 450, aff'd, 165 F. 2d 188; *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, aff'd, 72 F. 2d 705; *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585; *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840; *Missouri* v. *Becker*, 364 Mo. 1079, 272 S. W. 2d 283; *Adams Theatre Co.* v. *Keenan*, 12 N. J. 267, 96 A. 2d 519; *Bantam Books, Inc.* v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47; *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389; cf. *Roth* v. *Goldman*, 172 F. 2d 788, 794–795 (concurrence).

430336 O—57——34

trier of facts, he was judging each item as a whole as it would affect the normal person,[27] and in *Roth*, the trial judge instructed the jury as follows:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
>
> . . . . .
>
> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

---

[27] In *Alberts*, the contention that the trial judge did not read the materials in their entirety is not before us because not fairly comprised within the questions presented. U. S. Sup. Ct. Rules, 15 (1)(c)(1).

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. *Winters* v. *New York*, 333 U. S. 507. The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [28] The California statute makes punishable, *inter alia*, the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise.[29] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States* v. *Petrillo*, 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on

---

[28] This Court, as early as 1896, said of the federal obscenity statute: ". . . Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." *Rosen* v. *United States*, 161 U. S. 29, 42.

[29] *E. g.*, *Roth* v. *Goldman*, 172 F. 2d 788, 789; *Parmelee* v. *United States*, 72 App. D. C. 203, 204, 113 F. 2d 729, 730; *United States* v. *4200 Copies International Journal*, 134 F. Supp. 490, 493; *United States* v. *One Unbound Volume*, 128 F. Supp. 280, 281.

which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." *Id.*, at 7. See also *United States* v. *Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340; *United States* v. *Ragen*, 314 U. S. 513, 523–524; *United States* v. *Wurzbach*, 280 U. S. 396; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *Fox* v. *Washington*, 236 U. S. 273; *Nash* v. *United States*, 229 U. S. 373.[30]

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "*Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment.[31] We

---

[30] It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States*, 165 U. S. 486, 499–500.

[31] For the same reason, we reject, in this case, the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment.

therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7.[32] In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 95–96, this Court said:

> ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual

---

[32] In *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506–508, this Court said:

"The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded . . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy . . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions. ". . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 96.

The judgments are

Affirmed.

MR. CHIEF JUSTICE WARREN, concurring in the result.

I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

Appellant Alberts was charged with wilfully, unlawfully and lewdly disseminating obscene matter. Obscenity has been construed by the California courts to mean having a substantial tendency to corrupt by arousing lustful desires. *People* v. *Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853. Petitioner Roth was indicted for unlawfully, wilfully and knowingly mailing obscene material that was calculated to corrupt and debauch the minds and morals of those to whom it was sent. Each was accorded all the protections of a criminal trial. Among other things, they contend that the statutes under which they were convicted violate the constitutional guarantees of freedom of speech, press and communication.

That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of *scienter*. Under the California law, the prohibited activity must be done "wilfully and lewdly." The federal statute limits the crime to acts done "knowingly." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or

graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

MR. JUSTICE HARLAN, concurring in the result in No. 61, and dissenting in No. 582.

I regret not to be able to join the Court's opinion. I cannot do so because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

I.

My basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of "obscenity," are ignored.

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their

nature or supposed deleterious effect upon human conduct. Proceeding from the premise that "no issue is presented in either case, concerning the obscenity of the material involved," the Court finds the "dispositive question" to be "whether obscenity is utterance within the area of protected speech and press," and then holds that "obscenity" is not so protected because it is "utterly without redeeming social importance." This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a fact-finder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the

question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that in one case we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and in the other the power of the Federal Government against the limitations of the First Amendment. I deal with this subject more particularly later.

Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California the book must have a "tendency to deprave or corrupt its readers"; under the federal statute it must tend "to stir sexual impulses and lead to sexually impure

thoughts." [1] The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest." The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the "depraved and corrupt" and "sexual thoughts" tests:

> "Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is

---

[1] In *Alberts* v. *California*, the state definition of "obscenity" is, of course, binding on us. The definition there used derives from *People* v. *Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, the question being whether the material has "a substantive tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In *Roth* v. *United States*, our grant of certiorari was limited to the question of the constitutionality of the statute, and did not encompass the correctness of the definition of "obscenity" adopted by the trial judge as a matter of statutory construction. We must therefore assume that the trial judge correctly defined that term, and deal with the constitutionality of the statute as construed and applied in this case.

The two definitions do not seem to me synonymous. Under the federal definition it is enough if the jury finds that the book as a whole leads to certain thoughts. In California, the further inference must be drawn that such thoughts will have a substantive "tendency to deprave or corrupt"—*i. e.*, that the thoughts induced by the material will affect character and action. See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10 (2), Comments, p. 10.

unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking . . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look . . . ." [2]

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother BRENNAN elsewhere intimates,[3] then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

I now pass to the consideration of the two cases before us.

II.

I concur in the judgment of the Court in No. 61, *Alberts* v. *California*.

The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a "tendency

[2] *Ibid.*

[3] See dissenting opinion of MR. JUSTICE BRENNAN in *Kingsley Books, Inc.* v. *Brown*, No. 107, *ante*, p. 447.

to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. See Jackson, J., dissenting in *Beauharnais* v. *Illinois*, 343 U. S. 250, 287. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 324–325.

What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words *can* "deprave or corrupt" the reader—that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the

moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State.

Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader.

What has been said, however, does not dispose of the case. It still remains for us to decide whether the state court's determination that this material should be suppressed is consistent with the Fourteenth Amendment; and that, of course, presents a federal question as to which we, and not the state court, have the ultimate responsibility. And so, in the final analysis, I concur in the judgment because, upon an independent perusal of the material involved, and in light of the considerations dis-

cussed above, I cannot say that its suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause. I therefore agree with the Court that appellant's conviction must be affirmed.

III.

I dissent in No. 582, *Roth* v. *United States*.

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. See *Beauharnais* v. *Illinois*, *supra*. But laying aside any consequences which might flow from that conclusion, cf. Mr. Justice Holmes in *Gitlow* v. *New York*, 268 U. S. 652, 672,[4] I prefer to rest my views about this case on broader and less abstract grounds.

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many

[4] "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. Cf. *Pennsylvania* v. *Nelson*, 350 U. S. 497. But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.[5]

---

[5] The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House* v. *Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430–433; Holmes, J., dissenting, in *Leach* v. *Carlile*, 258 U. S. 138, 140; *Cates* v. *Hazlerline*, 342 U. S. 804, reversing 189 F. 2d 369; *Door* v. *Donaldson*, 90 U. S. App. D. C. 188, 195 F. 2d 764.

What Mr. Justice Jackson said in *Beauharnais, supra*, 343 U. S., at 294–295, about criminal libel is equally true of obscenity:

> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power . . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests."

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation." [6] Different States will have different attitudes toward the same work of literature.. The same book which is freely read in one State might be

[6] Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 493.

430336 O—57——35

classed as obscene in another.[7] And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the

---

[7] To give only a few examples: Edmund Wilson's "Memoirs of Hecate County" was found obscene in New York, see *Doubleday & Co.* v. *New York*, 335 U. S. 848; a bookseller indicted for selling the same book was acquitted in California. "God's Little Acre" was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania.

fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment. So viewed, I do not think that this conviction can be upheld. The petitioner was convicted under a statute which, under the judge's charge,[8] makes it criminal to sell books which "tend to stir sexual impulses and lead to sexually impure thoughts." I cannot agree that any book which tends to stir sexual impulses and lead to sexually impure thoughts necessarily is "utterly without redeeming social importance." Not only did this charge fail to measure up to the standards which I understand the Court to approve, but as far as I can see, much of the great literature of the world could lead to conviction under such a view of the statute. Moreover, in no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts."[9]

It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed

---

[8] While the correctness of the judge's charge is not before us, the question is necessarily subsumed in the broader question involving the constitutionality of the statute as applied in this case.

[9] See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10, Comments, p. 20: "As an independent goal of penal legislation, repression of sexual thoughts and desires is hard to support. Thoughts and desires not manifested in overt antisocial behavior are generally regarded as the exclusive concern of the individual and his spiritual advisors."

only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class. "You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The trial judge who, sitting without a jury, heard the *Alberts* case and the appellate court that sustained the

judgment of conviction, took California's definition of "obscenity" from *People* v. *Wepplo*, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853, 855. That case held that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government. *Dennis* v. *United States*, 341 U. S. 494, 502–511. Cf. Chafee, The Blessings of Liberty (1956), p. 69. This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. As recently stated by two of our outstanding authorities on obscenity, "The danger of influencing a change in the current moral standards of the community, or of shocking

or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom." Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 387.

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

> "There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. - When those who know so much about the problem of delinquency among youth—the very

> group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates [*sic*] the relative unimportance of literature in sex thoughts as compared with other factors in society." Lockhart & McClure, *op. cit. supra,* pp. 385–386.

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or

of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." Lockhart & McClure, *op. cit. supra,* at 371. The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be

concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest." * Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted.

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression pro-

---

*The definition of obscenity which the Court adopts seems in substance to be that adopted by those who drafted the A. L. I., Model Penal Code. § 207.10 (2) (Tentative Draft No. 6, 1957).

"Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." *Id.*, at 10.

tected by the First Amendment." With the exception of *Beauharnais* v. *Illinois*, 343 U. S. 250, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment. Unlike the law of libel, wrongfully relied on in *Beauharnais*, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment. In fact, the first reported court decision in this country involving obscene literature was in 1821. Lockhart & McClure, *op. cit. supra*, at 324, n. 200. I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 498; *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477–478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

FREEDMAN v. MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 69. Argued November 19, 1964.—Decided March 1, 1965.

Appellant was convicted of exhibiting a motion picture without submitting it to the Maryland State Board of Censors for prior approval, despite his contention that the motion picture censorship statute unconstitutionally impaired freedom of expression. The Maryland Court of Appeals affirmed. *Held:*

1. Where motion pictures are concerned, a requirement of prior submission to a censorship board is not necessarily unconstitutional *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43. Pp. 53–54.

2. One can challenge a licensing statute which endangers freedom of expression, whether or not his conduct could be prohibited by a properly drawn statute and whether or not he applied for a license. P. 56.

3. There is a heavy presumption against the constitutional validity of prior restraints of expression. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70. P. 57.

4. A noncriminal process requiring prior submission of a film to a censor avoids constitutional invalidity only with procedural safeguards designed to eliminate the dangers of censorship. Pp. 58–60.

(a) The censor must have the burden of proving that the film is expression unprotected by the Constitution. P. 58.

(b) Any restraint prior to judicial review must be limited to preservation of the status quo and for the shortest period compatible with sound judicial procedure. Pp. 58–59.

(c) A prompt final judicial determination of obscenity must be assured. P. 59.

5. The absence in the Maryland procedure of adequate safeguards against undue inhibition of protected expression renders the statutory requirement of prior submission to censorship an invalid previous restraint. Pp. 59–60.

233 Md. 498, 197 A. 2d 232, reversed.

Felix J. Bilgrey argued the cause for appellant. With him on the brief were *Richard C. Whiteford* and *Louis H. Pollak.*

Thomas B. Finan, Attorney General of Maryland, argued the cause for appellee. With him on the brief were *Robert F. Sweeney* and *Roger D. Redden*, Assistant Attorneys General.

Edward De Grazia and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae*, urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, Md. Ann. Code, 1957, Art. 66A, and exhibited the film "Revenge at Daybreak" at his Baltimore theatre without first submitting the picture to the State Board of Censors as required by § 2 thereof.[1] The State concedes that the picture does not violate the statutory standards[2] and

---

[1] Md. Ann. Code, 1957, Art. 66A, § 2:

"It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

[2] Md. Ann. Code, 1957, Art. 66A, § 6:

"(a) *Board to examine, approve or disapprove films*.—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

"(b) *What films considered obscene*.—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability

would have received a license if properly submitted, but the appellant was convicted of a § 2 violation despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed, 233 Md. 498, 197 A. 2d 232, and we noted probable jurisdiction, 377 U. S. 987. We reverse.

I.

In *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, we considered and upheld a requirement of submission of motion pictures in advance of exhibition. The Court of Appeals held, on the authority of that decision, that "the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments." 233 Md., at 505, 197 A. 2d, at 235. This reliance on *Times Film* was misplaced. The only question tendered for decision in that case was "whether a prior restraint was necessarily unconstitutional *under all circumstances*." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70, n. 10

---

of this effect is so great as to outweigh whatever other merits the film may possess.

"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

(emphasis in original). The exhibitor's argument that the requirement of submission without more amounted to a constitutionally prohibited prior restraint was interpreted by the Court in *Times Film* as a contention that the "constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture . . . even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government . . . ." 365 U. S., at 46, 47. The Court held that on this "narrow" question, *id.*, at 46, the argument stated the principle against prior restraints too broadly; citing a number of our decisions, the Court quoted the statement from *Near* v. *Minnesota*, 283 U. S. 697, 716, that "the protection even as to previous restraint is not absolutely unlimited." In rejecting the proffered proposition in *Times Film* the Court emphasized, however, that "[i]t is that question alone which we decide," 365 U. S., at 46, and it would therefore be inaccurate to say that *Times Film* upheld the specific features of the Chicago censorship ordinance.

Unlike the petitioner in *Times Film*, appellant does not argue that § 2 is unconstitutional simply because it may prevent even the first showing of a film whose exhibition may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in *Times Film;* accepting the rule in *Times Film*, he argues that § 2 constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's deci-

sion reversed. Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action. § 17. If the film is disapproved, or any elimination ordered, § 19 provides that

> "the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals."

Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United Artists Corp.* v. *Maryland State Board of Censors*, 210 Md. 586, 124 A. 2d 292.

In the light of the difference between the issues presented here and in *Times Film*, the Court of Appeals erred in saying that, since appellant's refusal to submit the film to the Board was a violation only of § 2, "he has restricted himself to an attack on that section

alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute." 233 Md., at 505, 197 A. 2d, at 236. Appellant has not challenged the submission requirement in a vacuum but in a concrete statutory context. His contention is that § 2 effects an invalid prior restraint because the structure of the other provisions of the statute contributes to the infirmity of § 2; he does not assert that the other provisions are independently invalid.

In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Thornhill* v. *Alabama*, 310 U. S. 88, 97; see *Staub* v. *City of Baxley*, 355 U. S. 313, 319; *Saia* v. *New York*, 334 U. S. 558; *Thomas* v. *Collins*, 323 U. S. 516; *Hague* v. *CIO*, 307 U. S. 496; *Lovell* v. *City of Griffin*, 303 U. S. 444, 452–453. Standing is recognized in such cases because of the ". . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S. 415, 433; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–76, 80–81, 96–104 (1960). Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute,[3] we think that appellant's assertion of a similar

[3] Appellant also challenges the constitutionality of § 6, establishing standards, as invalid for vagueness under the Due Process Clause; § 11, imposing fees for the inspection and licensing of a film, as consti-

danger in the Maryland apparatus of censorship—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

II.

Although the Court has said that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503, it is as true here as of other forms of expression that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, *supra*, at 70. ". . . [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U. S. 717, 731. The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the

---

tuting an invalid tax upon the exercise of freedom of speech; and § 23, allowing exemptions to various classes of exhibitors, as denying him the equal protection of the laws. In view of our result, we express no views upon these claims.

constitutionally protected interests in free expression.[4] And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser* v. *Randall*, 357 U. S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc.* v. *Sullivan*, *supra*; *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Marcus* v. *Search Warrant*, *supra*; *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 518–519. To this end, the exhibitor must be assured, by

[4] See Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 656–659 (1955). This is well illustrated by the fact that the Maryland Court of Appeals has reversed the Board's disapproval in every reported case. *United Artists Corp.* v. *Maryland State Board of Censors*, *supra*; *Maryland State Board of Censors* v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833; *Fanfare Films, Inc.* v. *Motion Picture Censor Board*, 234 Md. 10, 197 A. 2d 839.

statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See *Bantam Books, Inc.* v. *Sullivan*, *supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.[5]

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume

[5] An appendix to the brief *amici curiae* of the American Civil Liberties Union and its Maryland Branch lists New York, Virginia and Kansas as the three States having statutes similar to the Maryland statute, and the cities of Chicago, Detroit, Fort Worth and Providence as having similar ordinances. Twenty-eight of the remaining 39 municipal ordinances and codes are listed as "inactive."

the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

III.

How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected.

The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition

that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date—far enough in advance so that the exhibitor could safely advertise the opening on a normal basis. Failing such a scheme or sufficiently early submission under such a scheme, the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute. Otherwise, litigation might be unduly expensive and protracted, or the victorious exhibitor might find the most propitious opportunity for exhibition past. We do not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation to accord with local exhibition practices, and in doing so to avoid the potentially chilling effect of the Maryland statute on protected expression.

Reversed.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

On several occasions I have indicated my view that movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression. *Superior Films* v. *Department of Education*, 346 U. S. 587, 588; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 697; *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 78.* For the reasons there stated, I do not

*The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul

believe any form of censorship—no matter how speedy or prolonged it may be—is permissible. As I see it, a pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre. I would not admit the censor even for the limited role accorded him in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436. I adhere to my dissent in that case. *Id.*, at 446–447. Any authority to obtain a temporary injunction gives the State "the paralyzing power of a censor." *Id.*, at 446. The regime of *Kingsley Books* "substitutes punishment by contempt for punishment by jury trial." *Id.*, at 447. I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.

---

of the First Amendment: (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured. Thus the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp.* v. *Chicago*, 365 U. S. 43, could not survive under today's standards, for it provided not one of these safeguards, as the dissenters there expressly pointed out. *Id.*, at 73–75.

UNITED STATES v. THIRTY-SEVEN (37) PHOTOGRAPHS (LUROS, CLAIMANT)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 133. Argued January 20, 1971—Decided May 3, 1971

Customs agents seized as obscene photographs possessed by claimant Luros when he returned to this country from Europe on October 24, 1969. Section 1305 (a) of 19 U. S. C., pursuant to which the agents acted, prohibits the importation of obscene material, provides for its seizure at any customs office and retention pending the judgment of the district court, and specifies that the collector of customs give information of the seizure to the district attorney, who shall institute forfeiture proceedings. The agents referred the matter to the United States Attorney, who brought forfeiture proceedings on November 6. Luros' answer denied that the photographs were obscene and counterclaimed that § 1305 (a) was unconstitutional. He asked for a three-judge court, which on November 20 was ordered to be convened. Following a hearing on January 9, 1970, the court on January 27 held § 1305 (a) unconstitutional on the grounds that the statute (1) failed to meet the procedural requirements of *Freedman* v. *Maryland*, 380 U. S. 51, and (2) was overly broad as including within its ban obscene material for private use, making it invalid under *Stanley* v. *Georgia*, 394 U. S. 557. *Held:* The judgment is reversed and the case remanded. Pp. 367–379.

309 F. Supp. 36, reversed and remanded.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded in Part I that § 1305 (a) can be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman*, *supra*. Pp. 367–375.

(a) In *Freedman*, unlike the situation here, the statute failing to specify time limits was enacted pursuant to state authority and could not be given an authoritative construction by this Court to avoid the constitutional issue. P. 369.

(b) The reading into § 1305 (a) of the time limits required by *Freedman*, comports with the legislative purpose of the statute

419-882 O - 72 - 28

and furthers the policy of statutory construction to avoid a constitutional issue. Pp. 370–373.

(c) Section 1305 (a) may be constitutionally applied as construed to require intervals of no longer than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court (absent claimant-induced delays). Pp. 373–374.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN, concluded in Part II that Congress' constitutional power to remove obscene materials from the channels of commerce is unimpaired by this Court's decision in *Stanley, supra*. Cf. *United States* v. *Reidel*, *ante*, p. 351. Pp. 375–377.

MR. JUSTICE HARLAN concluded that Luros, who stipulated with the Government that the materials were imported for commercial purposes, lacked standing to challenge the statute for overbreadth on the ground that it applied to importation for private use. P. 378.

MR. JUSTICE STEWART, while agreeing that the First Amendment does not prevent the border seizure of obscene materials imported for commercial dissemination and that *Freedman* v. *Maryland*, 380 U. S. 51, imposes time limits for initiating forfeiture proceedings and completing the judicial obscenity determination, would not even intimate that the Government may lawfully seize literature intended for the importer's purely private use. P. 378.

WHITE, J., announced the Court's judgment and delivered an opinion in which (as to Part I) BURGER, C. J., and HARLAN, BRENNAN, STEWART, and BLACKMUN, JJ., joined, and in which (as to Part II), BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined. HARLAN, J., *post*, p. 377, and STEWART, J., *post*, p. 378, filed opinions concurring in the judgment and concurring in Part I of WHITE, J.'s opinion. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 379. MARSHALL, J., filed a dissenting opinion, *ante*, p. 360.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson* and *Roger A. Pauley*.

Stanley Fleishman argued the cause for appellees. With him on the brief was *Sam Rosenwein*.

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN join.*

When Milton Luros returned to the United States from Europe on October 24, 1969, he brought with him in his luggage the 37 photographs here involved. United States customs agents, acting pursuant to § 305 of the Tariff Act of 1930, as amended, 46 Stat. 688, 19 U. S. C. § 1305 (a),[1]

*MR. JUSTICE HARLAN and MR. JUSTICE STEWART also join Part I of the opinion.

[1] 19 U. S. C. § 1305 (a) provides in pertinent part:

"All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided . . . . *Provided, further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter

seized the photographs as obscene. They referred the matter to the United States Attorney, who on November 6 instituted proceedings in the United States District Court for forfeiture of the material. Luros, as claimant, answered, denying the photographs were obscene and setting up a counterclaim alleging the unconstitutionality of § 1305 (a) on its face and as applied to him. He demanded that a three-judge court be convened to issue an injunction prayed for in the counterclaim. The parties stipulated a time for hearing the three-judge court motion. A formal order convening the court was entered on November 20. The parties then stipulated a briefing schedule expiring on December 16. The court ordered a hearing for January 9, 1970, also suggesting the parties stipulate facts, which they did. The stipulation revealed, among other things, that some or all of the 37 photographs were intended to be incorporated in a hard cover edition of The Kama Sutra of Vatsyayana, a widely distributed book candidly describing a large number of sexual positions. Hearing was held as scheduled on January 9, and on January 27 the three-judge court filed its judgment and opinion declaring § 1305 (a) unconstitutional and enjoining its enforcement against the 37 photographs, which were ordered returned to Luros. 309 F. Supp. 36 (CD Cal. 1970). The judgment of invalidity rested on two grounds: first, that the section failed to comply with the procedural requirements of

---

thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

Freedman v. *Maryland*, 380 U. S. 51 (1965), and second, that under *Stanley* v. *Georgia*, 394 U. S. 557 (1969), § 1305 (a) could not validly be applied to the seized material. We shall deal with each of these grounds separately.

I

In *Freedman* v. *Maryland, supra*, we struck down a state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58. To insure that a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, we further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) "the procedure must also assure a prompt final judicial decision" to minimize the impact of possibly erroneous administrative action. *Id.*, at 58–59.

Subsequently, we invalidated Chicago's motion picture censorship ordinance because it permitted an unduly long administrative procedure before the invocation of judicial action and also because the ordinance, although requiring prompt resort to the courts after administrative decision and an early hearing, did not assure "a prompt judicial decision of the question of the alleged obscenity of the film." *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139, 141 (1968). So, too, in *Blount* v. *Rizzi*, 400 U. S. 410

(1971), we held unconstitutional certain provisions of the postal laws designed to control use of the mails for commerce in obscene materials. Under those laws an administrative order restricting use of the mails could become effective without judicial approval, the burden of obtaining prompt judicial review was placed upon the user of the mails rather than the Government, and the interim judicial order, which the Government was permitted, though not required, to obtain pending completion of administrative action, was not limited to preserving the status quo for the shortest fixed period compatible with sound judicial administration.

As enacted by Congress, § 1305 (a) does not contain explicit time limits of the sort required by *Freedman*, *Teitel*, and *Blount*.[2] These cases do not, however, require that we pass upon the constitutionality of § 1305 (a), for it is possible to construe the section to bring it in harmony with constitutional requirements.

[2] The United States urges that we find time limits in 19 U. S. C. §§ 1602 and 1604. Section 1602 provides that customs agents who seize goods must "report every such seizure immediately" to the collector of the district, while § 1604 provides that, once a case has been turned over to a United States Attorney, it shall be his duty "immediately to inquire into the facts" and "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay," if he concludes judicial proceedings are appropriate. We need not decide, however, whether §§ 1602 and 1604 can properly be applied to cure the invalidity of § 1305 (a), for even if they were applicable, they would not provide adequate time limits and would not cure its invalidity. The two sections contain no specific time limits, nor do they require the collector to act promptly in referring a matter to the United States Attorney for prosecution. Another flaw is that § 1604 requires that, if the United States Attorney declines to prosecute, he must report the facts to the Secretary of the Treasury for his direction, but the Secretary is under no duty to act with speed. The final flaw is that neither section requires the District Court in which a case is commenced to come promptly to a final decision.

It is true that we noted in *Blount* that "it is for Congress, not this Court, to rewrite the statute," 400 U. S., at 419, and that we similarly refused to rewrite Maryland's statute and Chicago's ordinance in *Freedman* and *Teitel*. On the other hand, we must remember that, "[w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). This cardinal principle did not govern *Freedman*, *Teitel*, and *Blount* only because the statutes there involved could not be construed so as to avoid all constitutional difficulties.

The obstacle in *Freedman* and *Teitel* was that the statutes were enacted pursuant to state rather than federal authority; while *Freedman* recognized that a statute failing to specify time limits could be saved by judicial construction, it held that such construction had to be "authoritative," 380 U. S., at 59, and we lack jurisdiction authoritatively to construe state legislation. Cf. *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335, 337 (1944). In *Blount*, we were dealing with a federal statute and thus had power to give it an authoritative construction; salvation of that statute, however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors. For the statute at issue in *Blount* not only failed to specify time limits within which judicial proceedings must be instituted and completed; it also failed to give any authorization at all to the administrative

agency, upon a determination that material was obscene, to seek judicial review. To have saved the statute we would thus have been required to give such authorization and to create mechanisms for carrying it into effect, and we would have had to do this in the face of legislative history indicating that the Postmaster General, when he had testified before Congress, had expressly sought to forestall judicial review pending completion of administrative proceedings. See 400 U. S., at 420 n. 8.

No such obstacles confront us in construing § 1305 (a). In fact, the reading into the section of the time limits required by *Freedman* is fully consistent with its legislative purpose. When the statute, which in its present form dates back to 1930, was first presented to the Senate, concern immediately arose that it did not provide for determinations of obscenity to be made by courts rather than administrative officers and that it did not require that judicial rulings be obtained promptly. In language strikingly parallel to that of the Court in *Freedman*, Senator Walsh protested against the "attempt to enact a law that would vest an administrative officer with power to take books and confiscate them and destroy them, because, in his judgment, they were obscene or indecent," and urged that the law "oblige him to go into court and file his information there . . . and have it determined in the usual way, the same as every other crime is determined." 72 Cong. Rec. 5419. Senator Wheeler likewise could not "conceive how any man" could "possibly object" to an amendment to the proposed legislation that required a customs officer, if he concluded material was obscene, to "tur[n] it over to the district attorney, and the district attorney prosecutes the man, and he has the right of trial by jury in that case." 71 Cong. Rec. 4466. Other Senators similarly indicated their aversion to censorship "by customs clerks and bureaucratic officials," *id.*, at 4437 (remarks of Sen.

Dill), preferring that determinations of obscenity should be left to courts and juries. See, *e. g., id.*, at 4433–4439, 4448, 4452–4459; 72 Cong. Rec. 5417–5423, 5492, 5497. Senators also expressed the concern later expressed in *Freedman* that judicial proceedings be commenced and concluded promptly. Speaking in favor of another amendment, Senator Pittman noted that a customs officer seizing obscene matter "should *immediately* report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." *Id.*, at 5420 (emphasis added). Commenting on an early draft of another amendment that was ultimately adopted, Senator Swanson noted that officers would be required to go to court "immediately." *Id.*, at 5422. Then he added:

> "The *minute* there is a suspicion on the part of a revenue or customs officer that a certain book is improper to be admitted into this country, he presents the matter to the district court, and there will be a *prompt* determination of the matter by a decision of that court." *Id.*, at 5424 (emphasis added).

Before it finally emerged from Congress, § 1305 (a) was amended in response to objections of the sort voiced above: it thus reflects the same policy considerations that induced this Court to hold in *Freedman* that censors must resort to the courts "within a specified brief period" and that such resort must be followed by "a prompt final judicial decision . . . ." 380 U. S., at 59. Congress' sole omission was its failure to specify exact time limits within which resort to the courts must be had and judicial proceedings be completed. No one during the congressional debates ever suggested inclusion of such limits, perhaps because experience had not yet demonstrated a need for them. Since 1930, however, the need has become clear. Our researches have disclosed cases sanctioning delays of as long as 40 days and even six

months between seizure of obscene goods and commencement of judicial proceedings. See *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851 (ND Cal. 1969); *United States* v. *One Carton Positive Motion Picture Film Entitled "491,"* 247 F. Supp. 450 (SDNY 1965), rev'd on other grounds, 367 F. 2d 889 (CA2 1966). Similarly, we have found cases in which completion of judicial proceedings has taken as long as three, four, and even seven months. See *United States* v. *Ten Erotic Paintings*, 311 F. Supp. 884 (Md. 1970); *United States* v. *35 MM Color Motion Picture Film Entitled "Language of Love,"* 311 F. Supp. 108 (SDNY 1970); *United States* v. *One Carton Positive Motion Picture Film Entitled "491," supra.* We conclude that to sanction such delays would be clearly inconsistent with the concern for promptness that was so frequently articulated during the course of the Senate's debates, and that fidelity to Congress' purpose dictates that we read explicit time limits into the section. The only alternative would be to hold § 1305 (a) unconstitutional in its entirety, but Congress has explicitly directed that the section not be invalidated in its entirety merely because its application to some persons be adjudged unlawful. See 19 U. S. C. § 1652. Nor does the construction of § 1305 (a) to include specific time limits require us to decide issues of policy appropriately left to the Congress or raise other questions upon which Congress possesses special legislative expertise, for Congress has already set its course in favor of promptness and we possess as much expertise as Congress in determining the sole remaining question—that of the speed with which prosecutorial and judicial institutions can, as a practical matter, be expected to function in adjudicating § 1305 (a) matters. We accordingly see no reason for declining to specify the time limits which must be incorporated into § 1305 (a)—a specification that is fully consistent with congressional purpose and that will obviate the constitu-

tional objections raised by claimant. Indeed, we conclude that the legislative history of the section and the policy of giving legislation a saving construction in order to avoid decision of constitutional questions require that we undertake this task of statutory construction.

We begin by examining cases in the lower federal courts in which proceedings have been brought under § 1305 (a). That examination indicates that in many of the cases that have come to our attention the Government in fact instituted forfeiture proceedings within 14 days of the date of seizure of the allegedly obscene goods, see *United States* v. *Reliable Sales Co.*, 376 F. 2d 803 (CA4 1967); *United States* v. *1,000 Copies of a Magazine Entitled "Solis,"* 254 F. Supp. 595 (Md. 1966); *United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 253 F. Supp. 498 (Md. 1966), aff'd, 373 F. 2d 635 (CA4 1967); *United States* v. *392 Copies of a Magazine Entitled "Exclusive,"* 253 F. Supp. 485 (Md. 1966); and judicial proceedings were completed within 60 days of their commencement. See *United States* v. *Reliable Sales Co., supra; United States* v. *1,000 Copies of a Magazine Entitled "Solis," supra; United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," supra; United States* v. *392 Copies of a Magazine Entitled "Exclusive," supra; United States* v. *127,295 Copies of Magazines, More or Less*, 295 F. Supp. 1186 (Md. 1968). Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305 (a) to require intervals of no more

than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. No seizure or forfeiture will be invalidated for delay, however, where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits or where administrative or judicial proceedings are postponed pending the consideration of constitutional issues appropriate only for a three-judge court.

Of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today. We do nothing in this case but construe § 1305 (a) in its present form, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass.

So construed, § 1305 (a) may constitutionally be applied to the case before us. Seizure in the present case took place on October 24 and forfeiture proceedings were instituted on November 6—a mere 13 days after seizure. Moreover, decision on the obscenity of Luros' materials might well have been forthcoming within 60 days had claimant not challenged the validity of the statute and caused a three-judge court to be convened. We hold that proceedings of such brevity fully meet the constitutional standards set out in *Freedman, Teitel,* and

Blount. Section 1305 (a) accordingly may be applied to the 37 photographs, providing that on remand the obscenity issue is resolved in the District Court within 60 days, excluding any delays caused by Luros.

II

We next consider Luros' second claim, which is based upon *Stanley* v. *Georgia, supra*. On the authority of *Stanley*, Luros urged the trial court to construe the First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read *Stanley* as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305 (a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.[3]

---

[3] The District Court's opinion is not entirely clear. The court may have reasoned that Luros had a right to import the 37 photographs in question for planned distribution to the general public, but our decision today in *United States* v. *Reidel*, *ante*, p. 351, makes it clear that such reasoning would have been in error. On the other hand, the District Court may have reasoned that, while Luros had no right to import the photographs for distribution, a person would have a right under *Stanley* to import them for his own private use and that § 1305 (a) was therefore void as overbroad because it prohibits both sorts of importation. If this was the court's reasoning, the proper approach, however, was not to invalidate the section in its entirety, but to construe it narrowly and hold it valid in its application to Luros. This was made clear in *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492 (1965), where the Court noted that, once the overbreadth of a statute has been sufficiently dealt with, it may be applied to prior conduct foreseeably within its valid sweep.

The trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In *United States* v. *Reidel*, *ante*, p. 351, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neither Luros nor his putative buyers have rights that are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth* v. *United States*, 354 U. S. 476 (1957), and reiterated today in *Reidel*, *supra*, obscenity is not within the scope of First Amendment protection. Hence Congress may

declare it contraband and prohibit its importation, as it has elected in § 1305 (a) to do.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 360.]

MR. JUSTICE HARLAN, concurring in the judgment and in Part I of MR. JUSTICE WHITE's opinion.

I agree, for the reasons set forth in Part I of MR. JUSTICE WHITE's opinion, that this statute may and should be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman* v. *Maryland*, 380 U. S. 51 (1965). Our decision today in *United States* v. *Reidel*, *ante*, p. 351, forecloses Luros' claim that the Government may not prohibit the importation of obscene materials for commercial distribution.

Luros also attacked the statute on its face as overbroad because of its apparent prohibition of importation for private use. A statutory scheme purporting to proscribe only importation for commercial purposes would certainly be sufficiently clear to withstand a facial attack on the statute based on the notion that the line between commercial and private importation is so unclear as to inhibit the alleged right to import for private use. Cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951). It is incontestable that 19 U. S. C. § 1305 (a) is intended to cover at the very least importation of obscene materials for commercial purposes. See n. 1 of MR. JUSTICE WHITE's opinion. Since the parties stipulated that the materials

were imported for commercial purposes, Luros cannot claim that his primary conduct was not intended to be within the statute's sweep. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492 (1965). Finally, the statute includes a severability clause. 19 U. S. C. § 1652.

Thus it is apparent that we could only narrow the statute's sweep to commercial importation, were we to determine that importation for private use is constitutionally privileged. In these circumstances, the argument that Luros should be allowed to raise the question of constitutional privilege to import for private use, in order to protect the alleged First Amendment rights of private importers of obscenity from the "chilling effects" of the statute's presence on the books, seems to me to be clearly outweighed by the policy that the resolution of constitutional questions should be avoided where not necessary to the decision of the case at hand.

I would hold that Luros lacked standing to raise the overbreadth claim. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 910 (1970).

On the foregoing premises I join Part I of the Court's opinion and as to Part II, concur in the judgment.*

MR. JUSTICE STEWART, concurring in the judgment and in Part I of MR. JUSTICE WHITE'S opinion.

I agree that the First Amendment does not prevent the border seizure of obscene materials sought to be imported for commercial dissemination. For the reasons expressed in Part I of MR. JUSTICE WHITE'S opinion, I also agree that *Freedman* v. *Maryland*, 380 U. S. 51, requires that there be time limits for the initiation of forfeiture proceedings and for the completion of the judicial determination of obscenity.

---

*Again, as in *United States* v. *Reidel*, *supra*, the obscenity *vel non* of the seized materials is not presented at this juncture of the case.

But I would not in this case decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer.[1] The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad,[2] returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley* v. *Georgia*, 394 U. S. 557.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.*

I

I dissent from the judgments of the Court for the reasons stated in many of my prior opinions. See, *e. g.*, *Smith* v. *California*, 361 U. S. 147, 155 (1959) (BLACK, J., concurring); *Ginzburg* v. *United States*, 383 U. S. 463, 476 (1966) (BLACK, J., dissenting). In my view the First Amendment denies Congress the power to act as censor and determine what books our citizens may read and what pictures they may watch.

I particularly regret to see the Court revive the doctrine of *Roth* v. *United States*, 354 U. S. 476 (1957), that "obscenity" is speech for some reason unprotected by the First Amendment. As the Court's many decisions

[1] As MR. JUSTICE WHITE's opinion correctly says, even if seizure of material for private use is unconstitutional, the statute can still stand in appropriately narrowed form, and the seizure in this case clearly falls within the valid sweep of such a narrowed statute. *Ante*, at 375, n. 3.

[2] *Aptheker* v. *Secretary of State*, 378 U. S. 500.

*[This opinion applies also to No. 534, *United States* v. *Reidel*, *ante*, p. 351.]

419-882 O - 72 - 29

in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is "obscene." Since the distinctions between protected speech and "obscenity" are so elusive and obscure, almost every "obscenity" case involves difficult constitutional issues. After *Roth* our docket and those of other courts have constantly been crowded with cases where judges are called upon to decide whether a particular book, magazine, or movie may be banned. I have expressed before my view that I can imagine no task for which this Court of lifetime judges is less equipped to deal. *Smith* v. *California, supra,* (BLACK, J., concurring).

In view of the difficulties with the *Roth* approach, it is not surprising that many recent decisions have at least implicitly suggested that it should be abandoned. See *Stanley* v. *Georgia,* 394 U. S. 557 (1969); *Redrup* v. *New York,* 386 U. S. 767 (1967). Despite the proved shortcomings of *Roth,* the majority in *Reidel* today reaffirms the validity of that dubious decision. Thus, for the foreseeable future this Court must sit as a Board of Supreme Censors, sifting through books and magazines and watching movies because some official fears they deal too explicitly with sex. I can imagine no more distasteful, useless, and time-consuming task for the members of this Court than perusing this material to determine whether it has "redeeming social value." This absurd spectacle could be avoided if we would adhere to the literal command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

II

Wholly aside from my own views of what the First Amendment demands, I do not see how the reasoning of MR. JUSTICE WHITE'S opinion today in *Thirty-Seven Photographs* can be reconciled with the holdings of

earlier cases. That opinion insists that the trial court erred in reading *Stanley* v. *Georgia*, *supra*, "as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use." *Ante*, at 376. But it is never satisfactorily explained just why the trial court's reading of *Stanley* was erroneous. It would seem to me that if a citizen had a right to possess "obscene" material in the privacy of his home he should have the right to receive it voluntarily through the mail. Certainly when a man legally purchases such material abroad he should be able to bring it with him through customs to read later in his home. The mere act of importation for private use can hardly be more offensive to others than is private perusal in one's home. The right to read and view any literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country.

The plurality opinion seems to suggest that *Thirty-Seven Photographs* differs from *Stanley* because "Customs officers characteristically inspect luggage and their power to do so is not questioned in this case . . . ." *Ante*, at 376. But surely this observation does not distinguish *Stanley*, because police frequently search private homes as well, and their power to do so is unquestioned so long as the search is reasonable within the meaning of the Fourth Amendment.

Perhaps, however, the plurality reasons silently that a prohibition against importation of obscene materials for private use is constitutionally permissible because it is necessary to prevent ultimate commercial distribution of obscenity. It may feel that an importer's intent to distribute obscene materials commercially is so difficult to prove that all such importation may be outlawed without offending the First Amendment. A very similar argument was made by the State in *Stanley* when it urged

that enforcement of a possession law was necessary because of the difficulties of proving intent to distribute or actual distribution. However, the Court unequivocally rejected that argument because an individual's right to "read or observe what he pleases" is so "fundamental to our scheme of individual liberty." 394 U. S., at 568.

Furthermore, any argument that all importation may be banned to stop possible commercial distribution simply ignores numerous holdings of this Court that legislation touching on First Amendment freedoms must be precisely and narrowly drawn to avoid stifling the expression the Amendment was designed to protect. Certainly the Court has repeatedly applied the rule against overbreadth in past censorship cases, as in *Butler* v. *Michigan*, 352 U. S. 380 (1957), where we held that the State could not quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.*, at 383. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *United States* v. *Robel*, 389 U. S. 258 (1967).

Since the plurality opinion offers no plausible reason to distinguish private possession of "obscenity" from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley*. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

The plurality opinion appears to concede that the customs obscenity statute is unconstitutional on its face after the Court's decision in *Freedman* v. *Maryland*, 380 U. S. 51 (1965), because this law specifies no time limits within which forfeiture proceedings must be started against seized books or pictures, and it does not require a prompt final judicial hearing on obscenity. *Ante*, at 368–369. Once the plurality has reached this determination, the proper course would be to affirm the lower court's de-

cision. But the plurality goes on to rewrite the statute by adding specific time limits. The plurality then notes that the Government here has conveniently stayed within these judicially manufactured limits by one day, and on that premise it concludes the statute may be enforced in this case. In my view the plurality's action in rewriting this statute represents a seizure of legislative power that we simply do not possess under the Constitution.

Certainly claimant Luros has standing to raise the claim that the customs statute's failure to provide for prompt judicial decision renders it unconstitutional. Our previous decisions make clear that such censorship statutes may be challenged on their face as a violation of First Amendment rights "whether or not [a defendant's] conduct could be proscribed by a properly drawn statute." *Freedman* v. *Maryland, supra,* at 56. This is true because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Since this censorship statute is unconstitutional on its face, and claimant has standing to challenge it as such, that should end the case without further ado. But the plurality nimbly avoids this result by writing a new censorship statute.

I simply cannot understand how the plurality determines it has the power to substitute the new statute for the one that the duly elected representatives of the people have enacted. The plurality betrays its uneasiness when it concedes that we specifically refused to undertake any such legislative task in *Freedman, supra,* and in *Blount* v. *Rizzi,* 400 U. S. 410 (1971). After holding the Maryland movie censorship law unconstitutional in *Freedman,* the Court stated:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory

scheme is, of course, for the State to decide." 380 U. S., at 60.

With all deference, I would suggest that the decision whether and how the customs obscenity law should be rewritten is a task for the Congress, not this Court. Congress might decide to write an entirely different law, or even decide that the Nation can well live without such a statute.

The plurality claims to find power to rewrite the customs obscenity law in the statute's legislative history and in the rule that statutes should be construed to avoid constitutional questions. *Ante,* at 373. I agree, of course, that statutes should be construed to uphold their constitutionality when this can be done without misusing the legislative history and substituting a new statute for the one that Congress has passed. But this rule of construction does not justify the plurality's acting like a legislature or one of its committees and redrafting the statute in a manner not supported by the deliberations of Congress or by our previous decisions in censorship cases.

The plurality relies principally on statements made by Senators Swanson and Pittman when the customs obscenity legislation was under discussion on the Senate floor. The defect in the Court's reliance is that the Senators' statements did not refer to the version of the law that was passed by Congress. Senator Pittman, objecting to one of the very first drafts of the law, said:

> "Why would it not protect the public entirely if we were to provide for the seizure as now provided and that the property should be held by the officer seizing, and that he should immediately report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." 72 Cong. Rec. 5240.

A few minutes later Senator Walsh of Montana announced he would propose an amendment "that would meet the suggestion made by the Senator from Nevada [Mr. Pittman] . . . ." *Id.*, at 5421. As Senator Walsh first presented his amendment it read:

> "Upon the appearance of any such book or other matter at any customs office the collector thereof shall *immediately* transmit information thereof to the district attorney of the district in which such port is situated, who shall *immediately* institute proceedings in the district court for the forfeiture and destruction of the same . . . ." *Ibid.* (Emphasis added.)

Senator Swanson was referring to this *first draft* of the Walsh amendment when he made the remarks cited by the plurality that officers would be required to go to court "immediately" and that there would be a "prompt" decision on the matter. *Id.*, at 5422, 5424. But just after Swanson's statement the Walsh amendment was changed on the Senate floor to read as follows:

> "Upon the seizure of such book or matter the *collector shall transmit* information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, *who shall institute* proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized." *Id.*, at 5424. (Emphasis added.)

Thus the requirement that officers go to court "immediately" was dropped in the second draft of the Walsh amendment, and the language of this second draft was enacted into law. The comments quoted and relied upon by the plurality were made with reference to an amendment draft that was not adopted by the Senate and is not now the law. This legislative history just referred

to provides no support that I can see for the Court's action today. To the extent that these debates tell us anything about the Senate's attitude toward prompt judicial review of censorship decisions they show simply that the issue was put before the Senate but that it did not choose to require prompt judicial review.

The plurality concedes that in previous censorship cases we have considered the validity of the statutes before us on their face, and we have refused to rewrite them. Although some of these cases did involve state statutes, in *Blount* v. *Rizzi*, 400 U. S. 410 (1971), we specifically declined to attempt to save a federal obscenity mail-blocking statute by redrafting it. The Court there plainly declared: "it is for Congress, not this Court, to rewrite the statute." *Id.*, at 419. The plurality in its opinion now seeks to distinguish *Blount* because saving the mail-blocking statute by requiring prompt judicial review "would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." *Ante*, at 369. But the only "expressed intention" cited by the plurality to support this argument is testimony by the Postmaster General that he wanted to forestall judicial review pending completion of administrative mail-blocking proceedings. *Ante*, at 370. That insignificant piece of legislative history would have posed no obstacle to the Court's saving the mail-blocking statute by requiring prompt judicial review *after* prompt administrative proceedings. Yet the Court in *Blount* properly refused to undertake such a legislative task, just as it did in the cases involving state censorship statutes.

The plurality also purports to justify its judicial legislation by pointing to the severability provisions contained in 19 U. S. C. § 1652. It is difficult to see how this distinguishes earlier cases, since the statutes struck down in *Freedman* v. *Maryland*, *supra*, and *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968), also contained

severability provisions. See Md. Ann. Code, Art. 66A, § 24 (1957), Municipal Code of Chicago § 155-7.4 (1961).

The plurality is not entirely clear whether the time limits it imposes stem from the legislative history of the customs law or from the demands of the First Amendment. At one point we are told that 14 days and 60 days are not the "only constitutionally permissible time limits," and that if Congress imposes new rules this would present a new constitutional question. *Ante*, at 374. This strongly suggests the time limits stem from the Court's power to "interpret" or "construe" federal statutes, not from the Constitution. But since the Court's action today has no support in the legislative history or the wording of the statute, it appears much more likely that the time limits are derived from the First Amendment itself. If the plurality is really drawing its rules from the First Amendment, I find the process of derivation both peculiar and disturbing. The rules are not derived by considering what the First Amendment demands, but by surveying previously litigated cases and then guessing what limits would not pose an "undue hardship" on the Government and the lower federal courts. *Ante*, at 373. Scant attention is given to the First Amendment rights of persons entering the country. Certainly it gives little comfort to an American bringing a book home to Colorado or Alabama for personal reading to be informed without explanation that a 74-day delay at New York harbor is not "undue." Faced with such lengthy legal proceedings and the need to hire a lawyer far from home, he is likely to be coerced into giving up his First Amendment rights. Thus the whims of customs clerks or the congestion of their business will determine what Americans may read.

I would simply leave this statute as the Congress wrote it and affirm the judgment of the District Court.

I do not understand why the plurality feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot, of course, believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power." *Turner* v. *United States*, 396 U. S. 398, 426 (1970) (BLACK, J., dissenting). In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Dennis* v. *United States*, 341 U. S. 494, 581 (1951) (BLACK, J., dissenting).